SUPREME COURT

No. 14-1175

Title:	Franchise Tax Board of California, Petitioner v. Gilbert P. Hyatt
Docketed:	March 25, 2015
Linked with 14A745	
Lower Ct:	Supreme Court of Nevada
Case Nos.:	(53264)
Decision Date:	September 18, 2014 Rehearing Denied: November 25, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Jan 9 2015	Application (14A745) to extend the time to file a petition for a writ of certiorari from February 23, 2015 to March 23, 2015, submitted to Justice Kennedy.
Jan 13 2015	Application (14A745) granted by Justice Kennedy extending the time to file until March 23, 2015.
Mar 23 2015	Petition for a writ of certiorari filed. (Response due April 24, 2015)
Apr 9 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent.
Apr 10 2015	Order extending time to file response to petition to and including May 26, 2015.
Apr 21 2015	Brief amicus curiae of Multistate Tax Commission filed.
Apr 24 2015	Brief amicus curiae of The International Municipal Lawyers Association filed.
Apr 24 2015	Brief amici curiae of West Virginia, and 39 Other States filed.
May 26 2015	Brief of respondent Gilbert P. Hyatt in opposition filed.
Jun 8 2015	Reply of petitioner Franchise Tax Board of California filed.
Jun 9 2015	DISTRIBUTED for Conference of June 25, 2015.
Jun 25 2015	DISTRIBUTED for Conference of June 29, 2015.
Jun 30 2015	Petition GRANTED limited to Questions 2 and 3 presented by the petition.
Jul 20 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 3, 2015.
Jul 20 2015	The time to file respondent's brief on the merits is extended to and including October 23, 2015.
Jul 21 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 28 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Sep 3 2015	Brief of petitioner Franchise Tax Board of California filed.
Sep 3 2015	Joint appendix filed. (Statement of costs filed)
Sep 10 2015	Brief amici curiae of Council of State Governments, et al. filed.

Sep 10 2015	Brief amicus curiae of South Carolina State Ports Authority filed.
Sep 10 2015	Brief amicus curiae of Multistate Tax Commission filed.
Sep 10 2015	Brief amici curiae of West Virginia and 43 Other States filed.
Oct 9 2015	SET FOR ARGUMENT on Monday, December 7, 2015
Oct 19 2015	Record requested from the Supreme Court of Nevada.
Oct 23 2015	Brief of respondent Gilbert P. Hyatt filed.
Oct 27 2015	CIRCULATED
Oct 30 2015	Brief amicus curiae of Professors of Federal Jurisdiction filed. (Distributed)
Nov 5 2015	Record received from the Supreme Court of Nevada is electronic and located on the Supreme Court of Nevada website. One box from the Supreme Court of Nevada was also received containing hard copies and CD's of the appendices.
Nov 23 2015	Reply of petitioner Franchise Tax Board of California filed. (Distributed)
Dec 7 2015	Argued. For petitioner: Paul D. Clement, Washington, D. C. For respondent: H. Bartow Farr, Washington, D. C.
Apr 19 2016	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Alito, J., concurred in the judgment. Roberts, C. J., filed a dissenting opinion, in which Thomas, J., joined.

14-1175

Supreme Court, U.S.
FILED
MAR 23 2015
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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March 23, 2015

QUESTIONS PRESENTED

1. Whether the federal discretionary-function immunity rule, 28 U.S.C. §2680(a), is categorically inapplicable to intentional torts and bad-faith conduct.

2. Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

3. Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

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PETITION FOR WRIT OF CERTIORARI

Over twenty years ago, petitioner Franchise Tax Board of the State of California (FTB), the California state agency charged with collecting California income taxes, audited respondent Gilbert P. Hyatt and determined that he had falsely disclaimed his California residency in order to avoid substantial state income taxes. Rather than simply exercise his right to challenge FTB's assessment via administrative review followed by suit in California state court, Hyatt also sued FTB in Nevada state court, alleging that FTB committed various intentional torts in conducting its audits. Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—before it finally reached trial. There, a Nevada jury demonstrated the dangers of allowing a sovereign State to be haled into another State's court system against its will by finding for Hyatt on every one of his claims and awarding Hyatt $490 million in damages. Another six years passed before the Nevada Supreme Court, while trimming the award, affirmed that FTB is liable for fraud and intentional infliction of emotional distress and must pay Hyatt over a million dollars in damages, with potentially millions more to come. In the process, the Nevada Supreme Court deepened splits on important federal issues and expressly declined to extend to California the same immunities Nevada enjoys in its own courts.

This extraordinary case demands the Court's review for a second time because the judgment below contravenes sovereign immunity principles three times over. First, the Nevada Supreme Court held that the federal discretionary-function immunity rule,

28 U.S.C. §2680(a), which applies in Nevada courts, is categorically inapplicable to intentional torts and bad-faith conduct. That conclusion squarely conflicts with the decisions of numerous federal circuits holding that subjective intent is irrelevant to discretionary-function immunity and, therefore, such immunity can apply even to intentional torts and bad-faith conduct.

Second, the court ignored this Court's previous decision in this case by declining to extend to a sister sovereign the same immunities Nevada enjoys in its own courts. If the Court persists in the view that a sovereign State can be haled into the courts of another State against its will (but see *infra*), then it is imperative that the foreign sovereign receive the same immunities as the domestic sovereign, as this Court indicated in its earlier decision. Nonetheless, the Nevada Supreme Court refused to apply a statutory cap on compensatory damages applicable to Nevada agencies, on the remarkably candid ground that extending the rule to a California agency would undermine the interest in compensating Nevadans without any corresponding benefit to Nevada and its taxpayers. That determination denies California its dignity as a co-equal sovereign and cannot be squared with basic principles of sovereign immunity, cooperative federalism, or the Full Faith and Credit Clause.

Third, the proceedings in this case amply demonstrate that this Court took a wrong turn in *Nevada v. Hall*, 440 U.S. 410 (1979). Bedrock principles of sovereign immunity dating back to the Framing make clear that a sovereign State cannot be haled into a sister State's court system absent its

consent. Moreover, this Court's cases recognize that a State generally may not be haled into federal court absent its consent, and all the same justifications apply *a fortiori* in the sister State context. *Nevada v. Hall* was decided before many of the Court's modern sovereign immunity cases, and it is incompatible with those later, better reasoned cases. Indeed, this case amply demonstrates the problems with allowing one sovereign to be sued in the courts of a different sovereign absent consent. A Nevada jury with an opportunity to award damages to a Nevada citizen at the expense of a California governmental entity did so to the tune of half a billion dollars. Although the Nevada Supreme Court eventually trimmed that award back half a decade later, it expressly refused to apply the immunities available to a Nevada state agency. These facts illustrate exactly why sovereign immunity does not allow a sovereign State to be placed at the mercy of foreign juries and judges absent consent. In short, this case presents a perfect vehicle for this Court to correct two certworthy errors made by the court below or one of its own, *viz.*, *Nevada v. Hall*.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 335 P.3d 125 and reproduced at App.1-73. The order of the Nevada Supreme Court denying rehearing is unreported and reproduced at App.74-75. The relevant orders of the state trial court are unreported, but reproduced at App.78-81.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2014, and denied rehearing on November 25, 2014. On January 13, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 23, 2015. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, §1 of the United States Constitution and 28 U.S.C. §2680(a) are reproduced at App.82-83.

STATEMENT OF THE CASE

A. Factual Background

Hyatt is a former resident of the State of California who has earned hundreds of millions of dollars in licensing fees on certain technology patents he once owned. App.4; *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 490-91 (2003). Hyatt filed a "part-year" resident income tax return in California for the year 1991, claiming that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. *Hyatt I*, 538 U.S. at 490. Within days after that purported move, Hyatt received substantial patent licensing fees that he did not report on his California tax return. App.4. Although Hyatt represented that he had lived in California for three-quarters of 1991, he reported only 3.5% of his total taxable income on his California return. And despite his supposed change of residence,

Hyatt claimed no moving expenses on his California return. *Id.*

Based on these discrepancies, FTB opened an audit into Hyatt's 1991 California return. FTB concluded that Hyatt did not move from California to Nevada before October 1991, as he had claimed, but rather remained a California resident until April 1992. App.4-5. It determined that, "in an effort to avoid [California] state income tax liability on his patent licensing," Hyatt "had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote." App.6. It further determined that although Hyatt claimed he had sold his California home to his work assistant, the purported sale was a sham. *Id.* FTB provided a "detailed explanation" of its conclusions, complete with evidence. It determined that Hyatt owed California approximately $1.8 million in unpaid state income taxes from 1991, plus an additional $2.6 million in penalties and interest. *Id.* Because it determined that Hyatt resided in California for part of 1992 yet paid no California taxes at all, FTB opened a second audit into Hyatt's state income tax liability for that year. App.7. It concluded that Hyatt owed an additional $6 million in taxes and interest for 1992, along with further penalties. *Id.*

Hyatt challenged the tax audits by filing protests with FTB. *Id.* Those protests initiated an administrative review process under which both audits were examined again to ensure their accuracy. FTB upheld the audits after administrative review. *Id.* Hyatt is currently challenging that outcome in an administrative appeal to the California State Board of

Equalization.[1] Hyatt has also filed a federal lawsuit against FTB board members and other State officials alleging violations of his constitutional rights. *See Hyatt v. Chiang*, No. 14-849, 2015 WL 545993, at *6 (E.D. Cal. Feb. 10, 2015) (dismissing suit as barred by Tax Injunction Act), *appeal docketed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

B. The Nevada Litigation

In January 1998, when the administrative review process was just beginning, Hyatt filed suit against FTB in Nevada state court. He asserted a variety of tort claims based on FTB's alleged conduct during its audits—specifically, negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. Hyatt sought compensatory and punitive damages. App.7-8, 11.

FTB moved for summary judgment on the ground that it was entitled to complete immunity from suit in Nevada just as it would be in California. App.10. Under California law, no public entity can be held liable for any injury caused by "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or by any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of sovereign immunity and comity, required the Nevada courts to

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[1] The decision below erroneously stated that Hyatt is challenging the audits' conclusions "in California courts." App.7 n.2.

grant FTB that same immunity. *Hyatt I*, 538 U.S. at 491-92.

The trial court denied the motion, and FTB sought review by petitioning the Nevada Supreme Court for a writ of mandamus ordering dismissal of the case. *Id.* at 492. The Nevada Supreme Court initially granted the petition and ordered judgment for FTB on all of Hyatt's claims. *Id.* Ten months later, however, it vacated its decision and instead granted the writ in part and denied it in part. It refused to extend complete immunity to FTB based on sovereign immunity, the Full Faith and Credit Clause, or comity, and held that "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. App.10. The Nevada Supreme Court therefore ordered the trial court to dismiss Hyatt's claim for negligent misrepresentation, but allowed his intentional tort claims to proceed.

C. *Hyatt I*

FTB filed a petition for certiorari, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. This Court granted certiorari and affirmed. It explained that the Full Faith and Credit Clause generally does not require one State to apply the law of another. *Hyatt I*, 538 U.S. at 496. Although recognizing that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," it held that the Full Faith and Credit Clause did not require Nevada to respect that sovereign interest by giving FTB the complete

immunity that it would have under California law. *Id.* at 498-99.

In reaching that conclusion, the Court acknowledged that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* at 499. But it observed that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Noting that the Nevada Supreme Court had merely granted FTB the same immunity that a Nevada agency would enjoy under similar circumstances—thereby placing FTB on an equal footing with Nevada agencies—the Court commented that the Nevada Supreme Court had "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit" to determine what immunity FTB was entitled to claim. *Id.*

The Court also emphasized that its ruling did *not* address a broader issue: whether the Constitution incorporates a principle of State sovereign immunity that protects a State from being sued in the courts of another State without its consent. *Id.* at 497. The Court had previously rejected that principle in *Nevada v. Hall*, 440 U.S. 410 (1979), holding that the Constitution did not "require[] all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I* that urged the Court to revisit and overrule *Hall*, explaining that the case "cannot be reconciled with" the leading decisions on State sovereign immunity. Br. of Florida et al. as Amici

Curiae 17, *Hyatt I*, 538 U.S. 488 (No. 02-42), 2002 WL 32134149. But because FTB itself did not press the issue at that time, the Court declined to reach it. *Hyatt I*, 538 U.S. at 497.

D. Trial and Appeal

Following this Court's decision in *Hyatt I*, the case returned to the Nevada state trial court. The parties then engaged in lengthy discovery and pretrial proceedings. Finally, in 2008—over ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App.11. The Nevada jury found for Hyatt on all his claims, awarding him just over $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id.*

Nevada law imposes a statutory cap on tort damages against a Nevada government agency. Nev. Rev. Stat. §41.035(1). For actions accruing before 2007, that cap was set at $50,000—less than one one-thousandth of the compensatory damages awarded against FTB. *See* 1995 Nev. Stat. 1071, 1073.[2] The same Nevada law also prohibits punitive damages against Nevada government agencies. Nev. Rev. Stat. §41.035(1). The state trial court, however, declined to apply those limits to FTB. Instead, it added over $2.5 million in costs and $102 million in prejudgment interest to the jury verdict, for a total judgment against FTB of over $490 million. App.11, 72.

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[2] That cap increased to $75,000 for actions accruing between Oct. 1, 2007 and Oct. 1, 2011, and to $100,000 for actions accruing after the latter date. 2007 Nev. Stat. 3015, 3024-25, 3027.

FTB appealed the numerous errors made by the trial court. First, it argued that under the federal discretionary-function immunity rule, 28 U.S.C. §2680(a), which the Nevada Supreme Court had adopted after *Hyatt I*, it could not be held liable for any claims arising from the inherently discretionary conduct underlying its audit of Hyatt's taxes—even intentionally tortious or bad-faith conduct. Second, it argued that Hyatt's intentional tort claims failed as a matter of law. Third, it argued that under principles of full faith and credit, cooperative federalism, sovereign immunity, and comity, the trial court should have treated FTB like a Nevada government entity by capping compensatory damages and precluding punitive damages. Finally, FTB preserved and pressed its argument that *Nevada v. Hall* was wrongly decided and should be overruled, and that FTB could not be haled into the Nevada courts absent its consent.

Six years after trial—over sixteen years after Hyatt filed suit—the Nevada Supreme Court affirmed in part and reversed in part. App.1-73. The court first held that FTB could not invoke the federal discretionary-function immunity rule to dispose of Hyatt's claims because, in its view, that rule is categorically inapplicable to "intentional torts and bad-faith misconduct." App.14. The court acknowledged that Nevada has "adopted ... the federal test for determining whether discretionary-function immunity applies." App.17. Furthermore, it noted that under this Court's jurisprudence, "[t]he focus of the inquiry" under the federal test "is not on the agent's subjective intent in exercising the discretion conferred ... but on the nature of the actions taken and on whether they are susceptible to policy analysis."

App.24 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)). And it conceded that "[o]ther courts" have held that "allegations of intentional or bad-faith misconduct are not relevant to determining if" federal discretionary-function immunity applies. App.19 (citing *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008), and *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135, 1141 (10th Cir. 1999)). Nevertheless, relying heavily on a single Second Circuit decision, *see* App.22-24 (citing *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000)), the court adopted a categorical rule that "[d]iscretionary-function immunity does not apply to intentional and bad-faith tort claims," App.72.

The Nevada Supreme Court then turned to the merits of Hyatt's intentional tort claims. It held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, App.25-38; however, it affirmed the jury's verdict finding FTB liable for fraud and intentional infliction of emotional distress, App.38-41, 46-51. On those counts, the court pointed to evidence that FTB disclosed Hyatt's address and social security number to third parties when requesting information, revealed to third parties that he was being audited, and took eleven years to resolve his administrative appeals, and that one of the auditors assigned to his case purportedly made an isolated remark regarding Hyatt's religion and was "intent on imposing an assessment" against Hyatt. App.40. In the court's view, this was sufficient evidence for the jury to find FTB liable for intentional infliction of emotional distress. App.50. It was also sufficient for the jury to find fraud, the court

concluded, because FTB had provided Hyatt a document at the outset of his audit explaining that during the audit process, Hyatt should expect "[c]ourteous treatment by FTB employees," "[c]onfidential treatment of any personal and financial information," and "[c]ompletion of the audit within a reasonable amount of time." App.5, 39. In the court's view, a reasonable jury could conclude these were "fraudulent representations," FTB "knew [they] were false," and FTB "intended for Hyatt to rely on [them]." App.40-41.

Turning to damages, the Nevada Supreme Court refused to apply to FTB the statutory damages cap applicable to a Nevada government entity. It conceded that "[m]ost courts" in other States extend to out-of-state entities the same protections granted to in-state entities. App.44. It nevertheless concluded that Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages." App.45. Accordingly, it "reject[ed] FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities." App.62. It then held that "[b]ecause punitive damages would not be available against a Nevada government entity," FTB was immune from punitive damages. App.65. The court accordingly upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest), and remanded for retrial on emotional distress damages due to evidentiary and jury-instruction errors. App.72.

REASONS FOR GRANTING THE PETITION

The decision below warrants this Court's review on three vitally important issues of sovereign immunity. *First*, certiorari is necessary to resolve the acknowledged split over the scope of the federal test for discretionary-function immunity under 28 U.S.C. §2680(a). As the Nevada Supreme Court conceded, numerous federal courts of appeals have held that subjective intent is irrelevant to determining whether §2680(a) applies. Siding with the minority view, however, the Nevada Supreme Court created a categorical exception to discretionary-function immunity that turns *entirely* on subjective intent, concluding that §2680(a) simply does not apply to intentional torts or bad-faith conduct. That holding deepens a conflict in the lower courts, cannot be reconciled with this Court's precedents, and eviscerates discretionary-function immunity in practice by allowing plaintiffs to challenge any government policy decision simply by alleging an intentional tort or bad faith.

Second, by refusing to extend to an out-of-state agency the same immunities that a Nevada state agency would receive, the Nevada Supreme Court violated this Court's command in *Hyatt I*. That decision explained that a State is not required to provide *greater* protection to an out-of-state agency than its own law provides to an in-state agency. But it cautioned that the Full Faith and Credit Clause and principles of sovereign immunity and cooperative federalism prohibit a State from exhibiting a "policy of hostility" for another State's sovereign status by departing from the "contours of [its] own sovereign

immunity from suit." 538 U.S. at 499. The Nevada Supreme Court blatantly transgressed these principles when it refused to extend to FTB, an out-of-state agency, the *same* sovereign immunity Nevada provides to in-state agencies. If this Court is going to retain the rule of *Nevada v. Hall*, it is imperative that it reaffirm the principle that a sister sovereign is entitled to the same immunities as the domestic sovereign.

Third, this case amply demonstrates that the better course would be to recognize that *Nevada v. Hall* is incompatible with both bedrock principles of sovereign immunity and later, better reasoned decisions of this Court and should be overruled. That decision departed from fundamental principles of sovereign immunity as understood at the Framing and as embodied in the structure of the Constitution. Subsequent decisions of this Court have developed those constitutional principles and recognized that the Eleventh Amendment is not a narrow principle applicable only in federal court, but a reflection of more fundamental constitutional principles equally applicable in state court. Those later decisions are better reasoned and incompatible with *Hall*. What is more, this case amply demonstrates the practical danger of allowing one State to be haled into the courts of a sister sovereign against its will. A Nevada jury needs little incentive to side with a Nevada citizen against another State's government, especially when the latter is involved in an inherently sovereign and inherently unpopular function like tax collection. And Nevada courts do not feel compelled to respect either the sister State's or Nevada's limitations on the waiver of sovereign immunity. In short, *Hall* has proven both

doctrinally and practically unworkable. This Court should take this opportunity to restore the dignity and residual sovereignty of the States. That sovereignty survived the formation of the national government and generally does not yield even in federal court. It should not yield to a mistaken decision that has proven unworkable in this very case.

I. This Court Should Grant Review To Determine Whether The Federal Discretionary-Function Immunity Rule Is Categorically Inapplicable To Intentional Torts And Bad-Faith Conduct.

In holding that the federal discretionary-function immunity rule categorically "does not apply to intentional and bad-faith tort claims," the Nevada Supreme Court concededly broke from the holdings of "[o]ther courts" that have held precisely the opposite. App.19, 72. Certiorari is necessary to resolve the acknowledged split on this important question.

The federal discretionary-function immunity rule provides that the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ... whether or not the discretion involved be abused." 28 U.S.C. §2680(a). The rule "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

This Court has articulated a two-part test for determining whether a government defendant is

entitled to discretionary-function immunity. First, the conduct at issue must "involve[] an element of judgment or choice"; and second, the judgment must be "of the kind that the discretionary function exception was designed to shield," that is, "governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37; *see Gaubert*, 499 U.S. at 322-23. The Nevada Supreme Court has expressly adopted the two-part federal test for discretionary-function immunity as its own, because the relevant state statute "mirrors the Federal Tort Claims Act." *Martinez v. Maruszczak*, 168 P.3d 720, 722 (Nev. 2007).[3]

In applying that test, "[t]he focus of the inquiry is not on the [defendant's] subjective intent ... but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Based on that reasoning, at least four federal courts of appeals have explicitly held that, in determining whether discretionary-function immunity applies, the defendant's subjective intent is irrelevant. *See, e.g., Irving v. United States*, 162 F.3d 154, 167 (1st Cir. 1998) ("We know from *Gaubert* that the subjective intent of an agency actor is irrelevant to conducting a discretionary function analysis."); *Fisher*

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[3] Other states have likewise adopted the federal test. *See, e.g., Johnson v. Agency of Transp.*, 904 A.2d 1060, 1063 (Vt. 2006). Because the decision below relies on the federal discretionary-immunity rule and federal precedent to interpret the parallel Nevada rule, App.14-15, 17-24, this Court has jurisdiction to "review[] the federal question on which the state law determination [was] premised." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 152 (1984); *see Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Bros. Sales v. United States, 46 F.3d 279, 286 (3d Cir. 1995) (*Gaubert* "ruled out any inquiry into an official's 'subjective intent'"); *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008) ("[S]ubjective intent is irrelevant to our analysis."); *Franklin Sav. Corp*, 180 F.3d at 1137 (*Gaubert* establishes "an affirmative bar to inquiry into officials' subjective intent"). Under the reasoning of these courts, performing a discretionary function in bad faith does not take that conduct outside the purview of the discretionary-function immunity rule.[4]

Along the same lines, at least three federal courts of appeals have expressly rejected the proposition that intentional torts fall outside the scope of the discretionary-function immunity rule. *See Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001) ("[C]laims of intentional torts ... must clear the §2680(a) discretionary function hurdle[.]"); *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994) (where "the tortious conduct involves a 'discretionary function,' a plaintiff cannot maintain an FTCA claim, even if the discretionary act constitutes an intentional tort"); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983). Two others have implicitly rejected that proposition by

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[4] Other circuits agree that *Gaubert* looks only to the objective nature of the decision at issue, not the extent to which the defendant subjectively weighed different policy priorities to make that decision. *See Indemnity Ins. Co. v. United States*, 569 F.3d 175, 181 (4th Cir. 2009); *Spotts v. United States*, 613 F.3d 559, 572 (5th Cir. 2010); *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997); *Demery v. U.S. Dep't of Interior*, 357 F.3d 830, 833 (8th Cir. 2004); *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998); *Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006).

dismissing intentional infliction of emotional distress claims on discretionary-function grounds. *See Pierce v. United States*, 804 F.2d 101, 102 (8th Cir. 1986); *Hart v. United States*, 894 F.2d 1539, 1543-46 (11th Cir. 1990).

The Nevada Supreme Court, however, declined to follow these decisions, and relied instead on the Second Circuit's position in *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000). App.22-24. In *Coulthurst*, the Second Circuit held that discretionary-function immunity did not apply where a prisoner alleged that a prison guard had failed to adequately inspect and maintain exercise equipment. The court concluded that if a decision not to inspect was "unrelated to any plausible policy objectives," then immunity would not be available. *Id.* at 111; *see also Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475-76 (2d Cir. 2006) (following *Coulthurst*). Under this approach, discretionary-function immunity depends on why the government official made the decision at issue; that is, it requires an inquiry into subjective intent that the other circuits have rejected. The Nevada Supreme Court then relied on that principle to hold that 28 U.S.C. §2680(a) contains a *categorical* "exception ... for intentional torts and bad-faith conduct," on the theory that such actions are by definition "unrelated to any plausible policy objective." App.24; *see* App.72 ("Discretionary-function immunity does not apply to intentional and bad-faith tort claims.").

The Nevada Supreme Court's holding is plainly irreconcilable with the majority view. Instead of holding that subjective intent is irrelevant and

intentional torts do not fall outside the discretionary-function immunity rule, the Nevada Supreme Court's rule is that once a plaintiff alleges intentionally tortious or bad-faith conduct, the claim is *automatically* exempt from the discretionary-function immunity rule. The court adopted this rule despite acknowledging that many "[o]ther courts" have "reached differing results." App.19. This conceded split in the lower courts over this Court's precedent clearly warrants certiorari.

As reflected by the substantial wall of precedent from which it diverged, the Nevada Supreme Court's decision is plainly wrong. To begin with, it is foreclosed by this Court's decisions, which make clear that discretionary-function immunity attaches so long as the challenged conduct involves "an element of judgment or choice" and is "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37. That test focuses on "the nature of the actions taken and on whether they are susceptible to policy analysis," and "not on the [defendant's] subjective intent" in carrying out the actions. *Gaubert*, 499 U.S. at 325. The Nevada Supreme Court's rule takes exactly the opposite approach: it focuses not on the actions taken but on the defendant's subjective intent in undertaking them. Its rule is also incompatible with the text and purpose of 28 U.S.C. §2680(a). "[T]he plain language" of that provision "states that the FTCA's general waiver of sovereign immunity is inapplicable to '*any* claim' based on a discretionary function." *Gray*, 712 F.2d at 507. The text admits no exceptions, much less the categorical exception created by the Nevada Supreme Court. Moreover, discretionary-function immunity exists to "prevent judicial 'second-guessing'" of policy

decisions entrusted to the other branches of government. *Gaubert*, 499 U.S. at 323. That is why it protects *all* discretionary decisions, "whether or not the discretion involved be abused." 28 U.S.C. §2680(a). It cannot serve that purpose if courts must second-guess the subjective intent behind those discretionary decisions in order to decide whether immunity is warranted.

Finally, the importance of this question confirms the need for certiorari. To begin with, proper construction of 28 U.S.C. §2680(a) would bring this misbegotten litigation—now in its seventeenth year—to a much-deserved end. Investigations conducted by governmental entities, like tax audits, are clearly discretionary functions under the *Gaubert* test. *See, e.g.*, *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001); *Johnson v. United States*, 680 F. Supp. 508, 514 (E.D.N.Y. 1987); *Foster v. Washoe Cnty.*, 964 P.2d 788, 792 (Nev. 1998). Therefore, absent the Nevada Supreme Court's misguided exception for intentionally tortious or bad-faith conduct, Hyatt's claims—all arising out of FTB's audit—cannot survive. More broadly, government agencies must know the metes and bounds of the federal discretionary-function rule. The wrong interpretation could—as here—drag a government through years of unwarranted litigation, imposing extraordinary institutional costs ultimately footed by taxpayers.

II. This Court Should Grant Review To Determine Whether A State May Refuse To Extend To Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

Certiorari is also warranted because, in refusing to treat a California agency as it would a Nevada agency, the Nevada Supreme Court flagrantly violated the principles of full faith and credit and cooperative federalism that this Court clearly set forth in *Hyatt I*. If this Court is to retain the rule of *Nevada v. Hall*, it is imperative that the Court reaffirm that a State haled into another State's court system against its will at least enjoys the same immunities as the host sovereign.

In *Hyatt I*, this Court held that the Full Faith and Credit Clause did not require Nevada to apply California law granting FTB full immunity from Hyatt's claims. Instead, Nevada could lawfully choose to provide FTB only the lesser protections of Nevada law. 538 U.S. at 498-99. Thus, the Court held, Nevada was not required to apply out-of-state law that would afford out-of-state agencies *greater* protections than in-state agencies. In reaching this conclusion, the Court relied on the critical premise—advanced by Hyatt himself—that Nevada sought only to treat an out-of-state agency *equal* to its own agencies. *See, e.g.*, Br. for Resp. at 8, 10, 38-39, *Hyatt I*, 538 U.S. 488 (No. 02-42), 2003 WL 181170; Tr. of Oral Argument at 46:19-20, *Hyatt I*, 538 U.S. 488 (No. 02-42) ("We are treating the other sovereign the way we treat ourselves.").

The Court took that equality premise seriously. In holding that Nevada was not required to treat an out-of-state agency better than an in-state agency, the Court was careful to note that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. And it signaled a different result should a State "exhibit[] a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll*, 349 U.S. at 413). But by affording equal treatment to in-state and out-of-state government agencies, this Court concluded that the Nevada Supreme Court had "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

The decision below eviscerates that premise and transgresses *Hyatt I*'s stated limitations. Instead of treating FTB *equal* to a Nevada agency, this time the Nevada Supreme Court treated FTB distinctly *worse* than a Nevada agency, denying FTB the compensatory damages cap that Nevada law provides for Nevada agencies. And it did so based on reasoning that only a host sovereign could embrace—namely, that there was no reason to subordinate Nevada's policy favoring full compensation for injured Nevadans to the interests of an out-of-state government. In every relevant respect, that determination squarely infringes on the "sovereignty interests" of California that *Hyatt I* preserved. *Id.*

First, the decision plainly demonstrates a "'policy of hostility to the public Acts'" of California. California law provides FTB absolute immunity, while Nevada

law provides its entities only a damages cap. Nev. Rev. Stat. §41.035(1). As *Hyatt I* establishes, it is one thing for Nevada to refuse FTB the absolute immunity it would enjoy under California law, but it is altogether different and impermissibly hostile for Nevada to refuse to apply the immunity granted by California *even to the extent consistent with Nevada law*—that is, to refuse FTB the same protection against unlimited damages that a Nevada entity would enjoy. If Nevada provides only a limited waiver of its own sovereign immunity, it cannot allow its citizens to hale sister sovereigns into court without providing those sovereigns at least as much protection as Nevada affords itself. If denying that equal treatment does not constitute "hostility," it is hard to imagine what does.

Second, the decision below fails to "sensitively appl[y] principles of comity." As the Nevada Supreme Court itself recognized, "[m]ost courts" hold that under comity, "a state should recognize another state's laws to the extent that they do not conflict with its own"—meaning that a State will not treat a sister State worse than itself. App.44 (citing *Solomon v. Supreme Court of Fla.*, 816 A.2d 788 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283 (Ill. 1989); *McDonnell v. Illinois*, 748 A.2d 1105 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247 (N.D. 2004)). Yet the Nevada Supreme Court disregarded these cases and declined to apply comity on the basis of a single decision, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992)). App.44-45. But that reasoning is doubly flawed. First, *Faulkner* predates *Hyatt I* and its equality premise; more important, *Faulkner*

addressed a materially different claim. There, the out-of-state agency argued that it should receive the immunity its *home state* afforded, which is precisely the argument *Hyatt I* rejected. *See* 627 So. 2d at 366. Here, however, the out-of-state agency argues that it is entitled to the protections that *Nevada* provides to its *own* agencies, which is what *Hyatt I* and broader principles of sovereign immunity and cooperative federalism require.

Third, the decision below clearly failed to display a "healthy regard for California's sovereign status." *Hyatt I*, 538 U.S. at 499. To the contrary, in refusing to apply to California agencies the same damages cap it applies to Nevada agencies, the Nevada Supreme Court manifested a palpable *disregard* for California's sovereign status. Nevada's damages cap recognizes the intrusion upon State sovereignty and proper government administration occasioned by excessive damages awards. *See, e.g.*, *Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (acknowledging that caps "protect taxpayers and public funds from potentially devastating judgments"). That intrusion is unquestionably present here; the decision below upheld compensatory damages against FTB of at least $1 million (pre-interest), with potentially millions more to come. The only difference is whether California or Nevada taxpayers will foot the bill. The Nevada Supreme Court's unwillingness to see the former as a comparably serious problem demonstrates at least a failure to fully respect a sister sovereign, and at most that the regime envisioned by *Hall* is simply unworkable.

Fourth, and most obviously, the Nevada Supreme Court failed to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499. Quite the contrary, for if the court had relied on the contours of "Nevada's own sovereign immunity"—which limits the amounts recoverable from the State—it would have applied those principles to FTB. Instead, the Nevada Supreme Court created an *exception* to its own law, holding that whatever caps may apply to Nevada state agencies do not apply to California agencies. While Nevada may have a "policy interest in providing adequate redress to Nevada citizens," App.45, Nevada has already decided how to balance that interest against its competing interest in protecting government officials and the public fisc, and that balance is reflected in the contours of the damages caps that it provides its own agencies. Having set that balance one way for itself, it cannot reset that balance differently for sister States.

At bottom, if this Court is to retain the rule of *Hall*, then the equal-treatment principle embraced in *Hyatt I* must be strictly enforced. If States really can be haled into the courts of their sister States without consent, then the Full Faith and Credit Clause and basic principles of sovereign immunity and cooperative federalism demand that the involuntarily coerced State receive at least the same protections as the host State. Any other rule allows one State to compensate its citizens at the expense of another sovereign's treasury on terms that the first State is unwilling to live with itself. Such a regime, embodied by the decision below, demeans sovereign immunity and poses a "substantial threat to our constitutional

system of cooperative federalism." *Hyatt I*, 538 U.S. at 497. The better course may well be to recognize that *Hall* was a wrong turn—but if not, it is imperative for this Court to make clear that a State must respect other States' sovereign immunity to the same extent as its own.

III. This Court Should Grant Review To Overrule *Nevada v. Hall*.

In *Nevada v. Hall*, this Court held that a State can be sued without its consent in the courts of another State. That holding violates the core principle of sovereign immunity: that "the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added). It runs contrary to the intent of the Framers, the structure of the Constitution, and the prior and subsequent, better reasoned sovereign immunity jurisprudence of this Court. And as the facts of this case demonstrate, it demeans the dignity of the States and seriously threatens interstate relations. This case perfectly demonstrates why *Hall* was wrongly decided, and why the Court should grant certiorari to reconsider and overrule that decision.[5]

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[5] FTB challenged the validity of *Hall* before the Nevada Supreme Court. Appellant's Opening Br. at 101 n.80, *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125 (Nev. 2014) (No. 53264). Given that the Nevada Supreme Court was not free to overrule *Hall*, that was more than sufficient to preserve this issue for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that issue is adequately preserved when "pressed or passed upon below"); *cf. Pennhurst State Sch. & Hosp. v.*

In *Hall*, California residents injured in an automobile collision with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-12. A California jury found negligence and awarded over a million dollars in damages. *Id.* at 413. This Court granted certiorari and held that principles of sovereign immunity do not preclude one State from being haled into the courts of another State. *See id.* at 426-27.

In so holding, the Court recognized that, at the Framing, common practice would have made sovereign immunity available to one State in the courts of another. *Id.* at 417. It likewise acknowledged that the debates over ratification of the Constitution, and later Supreme Court decisions, reflected "widespread acceptance of the view that a sovereign state is *never* amenable to suit without its consent." *Id.* at 415-20 (emphasis added). Nevertheless, the Court held that this "widespread" view was only relevant in the context of federal-court (not state-court) jurisdiction, and it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction of Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court therefore held that no "federal rule of law implicit in the Constitution ... requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, a State must simply hope that, as "a matter of comity"

Halderman, 465 U.S. 89, 99 n.8 (1984) (sovereign immunity "may be raised at any point").

and "wise policy," a sister State will not subject it to suit. *Id.* at 425-26.

Justice Blackmun dissented, joined by Chief Justice Burger and Justice Rehnquist. Unlike the majority, those Justices would have held that the Constitution implicitly embodied a "doctrine of interstate sovereign immunity" as an "essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). Justice Rehnquist also separately dissented, joined by Chief Justice Burger; he explained that the Court's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile ... with express holdings of this Court and the logic of the constitutional plan itself." *Id.* at 432-33 (Rehnquist, J., dissenting).

Hall was mistaken when decided, and subsequent developments have undermined its doctrinal underpinnings. In particular, a whole line of this Court's subsequent precedents have rejected the *Hall* majority's conception of the Eleventh Amendment as concerned only about federal court jurisdiction, and have instead explained that the Eleventh Amendment reflected the Framers' original understanding in ways that have implications for proceedings in state courts, *see Alden v. Maine*, 527 U.S. 706, 712 (1999), and even federal administrative agencies, *Fed. Mar. Comm'n v. S.C. State Ports Auth.* (*FMC*), 535 U.S. 743, 747 (2002). In short, subsequent developments have vindicated the views of the *Hall* dissenters in ways that make *Hall*'s reconsideration long overdue.

To begin with, the rule of *Hall* cannot be reconciled with any fair reading of history. As the *Hall*

majority conceded, the Framers would clearly have acknowledged the sovereign immunity of one State in the courts of another. See 440 U.S. at 417, 420. Indeed, a prominent Pennsylvania case from 1781 determined that an individual could not use the state courts of Pennsylvania to attach property belonging to Virginia. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. C.P. 1781); *see Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). While the ratification debates focused (naturally enough) on sovereign immunity in the new federal courts, the language they used leaves no doubt that the same immunity was recognized in state courts. *See, e.g.*, The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is *inherent in the nature of sovereignty* not to be amenable to the suit of an individual without its consent." (emphasis altered)); *see also* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 252-63. The "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

The Eleventh Amendment confirms the Framers' understanding. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), this Court held that a private citizen of one State could sue another State in federal court. The Eleventh Amendment was adopted as an immediate and outraged response, to restore to the States their "immunity from private suits." *Alden*, 527 U.S. at 724. While the Amendment does not explicitly address interstate sovereign immunity, it clearly shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be

haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). After all, the federal courts were intended to be a neutral forum for interstate disputes. A State would surely *rather* be tried in that neutral federal forum than before a partisan jury and judge in another State's courts. By removing the option of suit in federal forum while leaving the worse option of suit in another State's courts, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

Hall likewise conflicts with this Court's precedents from both before and after the decision. Before *Hall*, this Court repeatedly indicated that State sovereign immunity extended to "any court in this country." *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Beers*, 61 U.S. (20 How.) at 529; *see also In re New York*, 256 U.S. 490, 497 (1921) (noting the "fundamental rule of jurisprudence" that "a state may not be sued without its consent").[6] And since *Hall*, this Court has rejected almost every premise that underlies that decision. *Hall* refused to recognize sovereign immunity as a basic assumption

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[6] The only case on which *Hall* relied in holding otherwise was *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). But even that case recognized "a class of cases in which every sovereign is understood" to grant immunity to foreign sovereigns, based on the principle that "[a] foreign sovereign is not understood as intending to subject [itself] to a jurisdiction incompatible with [its] dignity." *Id.* at 137.

of the Constitution, 440 U.S. at 426; subsequent decisions, by contrast, have repeatedly treated sovereign immunity as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also, e.g., Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011); *FMC*, 535 U.S. at 751-53; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). *Hall* effectively limited sovereign immunity to the words of Article III and the Eleventh Amendment, 440 U.S. at 421, 424-27; subsequent cases, by contrast, have recognized that the Constitution implicitly protects principles of sovereign immunity that go beyond its literal text. *See, e.g., FMC*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-29; *Blatchford*, 501 U.S. at 779. *Hall* casually departed from the Framing-era view of sovereign immunity; subsequent cases have consistently relied on the Framing-era view, and have interpreted sovereign immunity to prohibit "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *FMC*, 535 U.S. at 756 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). In short, while *Hall* was wrong the day it was decided, a host of subsequent, better reasoned decisions have fatally undermined its doctrinal underpinnings.

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally had the felt need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall*

and found *Hall* distinguishable. But nothing in *Alden* suggests that *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with the *Hall* majority's view of the Eleventh Amendment as divorced from broader sovereign immunity principles. Indeed, based on *Alden*'s understanding of sovereign immunity, not even the *Hall* majority could credibly argue that it is permissible for a State to be haled into the courts of another State absent consent.

Not only does *Hall* rest on flawed doctrinal premises that have been eliminated by subsequent precedent; it has proven practically unworkable as well. Indeed, this Court need look no further than the facts of this case to understand why *Hall* must go. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—and untold financial and administrative burdens. Once the case finally reached trial, the Nevada jury below was happy to find for a fellow Nevadan on his questionable tort claims against the California tax authorities. They were even happier to award their fellow Nevadan some $388 million in damages, which the Nevada trial court calmly raised to over $490 million after costs and interest. Since trial, California has spent another seven years fighting that verdict, and it faces the prospect of yet another trial on remand if this Court denies review.

Perhaps worst of all, this suit has encouraged other Nevada residents to file similar complaints, raising the prospect of similar litigation in endless

repetition. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB). These suits are highly regrettable yet, given *Hall*, entirely unsurprising. Sovereign governments undertake a number of sovereign responsibilities that have been unpopular as long as there have been governments. Taxation is near the top of that list. Sovereign immunity allows the sovereign to undertake such activities without the constant threat of litigation. And while sovereigns are a tempting target for litigation in any circumstance, a jury might at least have some sense that a large verdict against the sovereign will ultimately be footed by taxpayers. Thus, a foreign sovereign stripped of sovereign immunity and haled into courts by citizens of a foreign State is a uniquely vulnerable target. What is more, an increasingly mobile citizenry creates ample opportunities for suits like this one. Indeed, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." David M. Grant, *Moving From Gold to Silver: Becoming a Nevada Resident*, Nev. Law., Jan. 2015, at 22, 25 n.9.

And make no mistake, the threat here extends beyond the State's fiscal and dignity interests. If FTB can be found liable for fraud and intentional infliction of emotional distress arising out of its "power to ... enforce income tax laws," *Hyatt I*, 538 U.S. at 498, it will undoubtedly be forced to alter how it conducts this "essential attribute of sovereignty." *Id.* But that is precisely why sovereign immunity has been extended

to States sued in their own courts and the federal courts. *See Alden*, 527 U.S. at 750-51 (observing that "[p]rivate suits against nonconsenting States" may "threaten the financial integrity of the States" and impose "substantial costs [upon] the autonomy, the decisionmaking ability, and the sovereign capacity of the States"). There is no principled reason why a State must endure these same burdens because it has been sued in another State's courts as opposed to its own courts or the federal courts.

In short, this case emphatically illustrates the "severe strains on our system of cooperative federalism" against which the *Hall* dissenters warned. *Hall*, 440 U.S. 429-30 (Blackmun, J., dissenting). If the Framers would have "reprehended the notion of a State's being haled before the courts of a sister State," *id.* at 431, a suit like this one would have left them aghast. This case firmly demonstrates the obvious flaws of *Hall* and the virtues of applying the sovereign immunity principles this Court has repeatedly recognized both before and after *Hall*.

But the Court need not take FTB's word for it: *Nevada itself* recently asked this Court to overrule *Hall* after being haled into the *California* courts against its will. *See* Petition for Writ of Certiorari 12 n.3, 17 n.8, 19, *Nevada v. City & Cnty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073). The spectacle of two States being sued in each other's courts—each unsuccessfully invoking sovereign immunity—confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would substitute a race-to-the-bottom for cooperative federalism. *See* 440 U.S. at 429-30 (Blackmun, J.).

And it underscores the absurdity and perniciousness of *Hall* in practice.

Needless to say, this Court does not reconsider its precedents lightly. But virtually every *stare decisis* consideration militates against retaining *Hall*. *Hall* set no substantive rules that "serve as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995), and *Hall* engenders no meaningful reliance interests. Most important, *stare decisis* cannot save a decision that is both practically unworkable and "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Id.* At a bare minimum, the continuing validity of *Hall* is a question that merits this Court's plenary consideration.

* * *

Each of the questions presented in this petition independently warrants certiorari. But it bears emphasizing that they are interrelated as well: each concerns the extent to which one State is at the mercy of another State's courts. Under fundamental principles of sovereign immunity and cooperative federalism, FTB should have never been subjected to suit in the Nevada courts in the first place. To the extent *Hall* holds otherwise, it should be overruled. But if the Court will not revisit *Hall*, then it becomes that much more important to reaffirm that the discretionary-function standard is more than a pleading obstacle, and that States may not afford foreign sovereigns less immunity than they grant themselves.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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March 23, 2015

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Appendix A

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/ Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/ Cross-Appellant.

Filed: September 18, 2014

Appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and from a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Affirmed in part, reversed in part, and remanded.

BEFORE THE COURT EN BANC.[1]

[1] The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.

OPINION

By the Court, HARDESTY, J.:

In 1998, inventor Gilbert P. Hyatt sued the Franchise Tax Board of the State of California (FTB) seeking damages for intentional torts and bad-faith conduct committed by FTB auditors during tax audits of Hyatt's 1991 and 1992 state tax returns. After years of litigation, a jury awarded Hyatt $139 million in damages on his tort claims and $250 million in punitive damages. In this appeal, we must determine, among other issues, whether we should revisit our exception to government immunity for intentional torts and bad-faith conduct as a result of this court's adoption of the federal test for discretionary-function immunity, which shields a government entity or its employees from suit for discretionary acts that involve an element of individual judgment or choice and that are grounded in public policy considerations. We hold that our exception to immunity for intentional torts and bad-faith conduct survives our adoption of the federal discretionary-function immunity test because intentional torts and bad-faith conduct are not based on public policy.

Because FTB cannot invoke discretionary-function immunity to protect itself from Hyatt's intentional tort and bad-faith causes of action, we must determine whether Hyatt's claims for invasion of privacy, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress survive as a matter of law, and if so, whether they are supported by substantial evidence. All of Hyatt's causes of action, except for his fraud and intentional infliction of emotion distress claims, fail as

a matter of law, and thus, the judgment in his favor on these claims is reversed.

As to the fraud cause of action, sufficient evidence exists to support the jury's findings that FTB made false representations to Hyatt regarding the audits' processes and that Hyatt relied on those representations to his detriment and damages resulted. In regard to Hyatt's claim for intentional infliction of emotional distress, we conclude that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe. As a result, substantial evidence supports the jury's findings as to liability, but evidentiary and jury instruction errors committed by the district court require reversal of the damages awarded for emotional distress and a remand for a new trial as to the amount of damages on this claim only.

In connection with these causes of action, we must address whether FTB is entitled to a statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that Nevada's policy interest in providing adequate redress to its citizens outweighs providing FTB a statutory cap on damages under comity, and therefore, we affirm the $1,085,281.56 of special damages awarded to Hyatt on his fraud cause of action and conclude that there is no statutory cap on the amount of damages that may be awarded on remand on the intentional infliction of emotional distress claim.

We also take this opportunity to address as a matter of first impression whether, based on comity, it

is reasonable to provide FTB with the same protection of California law, to the extent that it does not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

For the reasons discussed below, we affirm in part, reverse in part, and remand this case to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

California proceedings

In 1993, after reading a newspaper article regarding respondent/cross-appellant Hyatt's lucrative computer-chip patent and the large sums of money that Hyatt was making from the patent, a tax auditor for appellant/cross-respondent FTB decided to review Hyatt's 1991 state income tax return. The return revealed that Hyatt did not report, as taxable income, the money that he had earned from the patent's licensing payments and that he had only reported 3.5 percent of his total taxable income for 1991. Hyatt's tax return showed that he had lived in California for nine months in 1991 before relocating to Las Vegas, Nevada, but Hyatt claimed no moving expenses on his 1991 tax return. Based on these discrepancies, FTB opened an audit on Hyatt's 1991 state income tax return.

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to

provide certain information concerning his connections to California and Nevada and the facts surrounding his move to Nevada. A portion of the information request form contained a privacy notice, which stated in relevant part that "The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California." Also included with the notification was a document containing a list of what the taxpayer could expect from FTB: "Courteous treatment by FTB employees[,] Clear and concise requests for information from the auditor assigned to your case[,] Confidential treatment of any personal and financial information that you provide to us[,] Completion of the audit within a reasonable amount of time[.]"

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were estranged from Hyatt during the relevant period in

question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

The 1991 audit's finding that Hyatt did not move to Las Vegas until April 1992 prompted FTB to commence a second audit of Hyatt's 1992 California state taxes. Because he maintained that he lived in Nevada that tax year, Hyatt did not file a California tax return for 1992, and he opposed the audit. Relying in large part on the 1991 audit's findings and a single request for information sent to Hyatt regarding patent-licensing payments received in 1992, FTB found that Hyatt owed the state of California over $6 million in taxes and interest for 1992. Moreover, penalties similar to those imposed by the 1991 audit were later assessed.

Hyatt formally challenged the audits' conclusions by filing two protests with FTB that were handled concurrently. Under a protest, an audit is reviewed by FTB for accuracy, or the need for any changes, or both. The protests lasted over 11 years and involved 3 different FTB auditors. In the end, FTB upheld the audits, and Hyatt went on to challenge them in the California courts.[2]

Nevada litigation

During the protests, Hyatt filed the underlying Nevada lawsuit in January 1998. His complaint included a claim for declaratory relief concerning the timing of his move from California to Nevada and a claim for negligence. The complaint also identified seven intentional tort causes of action allegedly committed by FTB during the 1991 and 1992 audits: invasion of privacy—intrusion upon seclusion,

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[2] At the time of this appeal, Hyatt was still challenging the audits' conclusions in California courts.

invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against Hyatt were intended "to better bargain for and position the case to settle."

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district court granted FTB partial summary judgment.[3] As a result of the district court's ruling, the parties were required to litigate the action under the restraint that any determinations as to the audits' accuracy were not part of Hyatt's tort action and the jury would not make any findings as to when Hyatt moved to Nevada or whether the audits' conclusions were correct.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking

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[3] That ruling was not challenged in this court, and consequently, it is not part of this appeal.

recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hyatt's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ

petitions filed by FTB in this court in 2000. In those petitions, FTB sought immunity from the entire underlying Nevada lawsuit, arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the Full Faith and Credit Clause, or comity. This court resolved the petitions together in an unpublished order in which we concluded that FTB was not entitled to full immunity under any of these principles. But we did determine that, under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive. In light of that ruling, this court held that FTB was immune from Hyatt's negligence cause of action, but not from his intentional tort causes of action. The court concluded that while Nevada provided immunity for discretionary decisions made by government agencies, such immunity did not apply to intentional torts or bad-faith conduct because to allow it to do so would "contravene Nevada's policies and interests in this case."

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003). In *Hyatt*, the Supreme Court focused on the issue of whether the Full Faith and Credit Clause of the federal constitution required Nevada to afford FTB the benefit of the full immunity that California provides FTB. *Id.* at 494. The Court upheld this court's determination that Nevada was not required to give FTB full immunity *Id.* at 499. The Court further upheld this court's conclusion that FTB was entitled to partial immunity under comity principles, observing that this court "sensitively applied

principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* The Supreme Court's ruling affirmed this court's limitation of Hyatt's case against FTB to the intentional tort causes of action.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Following the trial, Hyatt sought prejudgment interest and moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded approximately $2.5 million in costs. The district court adopted the master's recommendation.

FTB appeals from the district court's final judgment and the post-judgment award of costs. Hyatt cross-appeals, challenging the district court's partial summary judgment ruling that he could not seek, as part of his damages at trial, economic damages for the alleged destruction of his patent-licensing business in Japan.[4]

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[4] This court granted permission for the Multistate Tax Commission and the state of Utah, which was joined by other states (Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio,

DISCUSSION

We begin by addressing FTB's appeal, which raises numerous issues that it argues entitle it to either judgment as a matter of law in its favor or remand for a new trial. As a threshold matter, we address discretionary-function immunity and whether Hyatt's causes of action against FTB are barred by this immunity, or whether there is an exception to the immunity for intentional torts and bad-faith conduct. Deciding that FTB is not immune from suit, we then consider FTB's arguments as to each of Hyatt's intentional tort causes of action. We conclude our consideration of FTB's appeal by discussing Nevada's statutory caps on damages and immunity from punitive damages. As for Hyatt's cross-appeal, we close this opinion by considering his challenge to the district court's partial summary judgment in FTB's favor on Hyatt's damages claim for economic loss.

FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad-faith conduct

Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part

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Oklahoma, Tennessee, Vermont, Virginia, and Washington) to file amicus curiae briefs.

of the State ... or of any ... employee ..., whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States*, 623 F.3d 855, 860 (9th Cir. 2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983); *see also Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Ill.*, 748 A.2d 1105, 1107 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761, 764-66 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247, 250, 250 (N.D. 2004). The purpose behind comity is to "foster cooperation, promote harmony, and build good will" between states. *Hansen*, 687 N.W.2d at 250 (internal quotations omitted). But whether to invoke

comity is within the forum state's discretion. *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies. *Id.* at 98, 658 P.2d at 424-25. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. Cal. Gov't Code § 860.2 (West 2012). FTB contends that it should receive the immunity protection provided by California statutes to the extent that such immunity does not violate Nevada's public policies under comity.

Discretionary-function immunity in Nevada

This court's treatment of discretionary-function immunity has changed over time. In the past, we applied different tests to determine whether to grant a government entity or its employee discretionary-function immunity. *See, e.g., Arnesano v. State ex rel. Dep't of Transp.*, 113 Nev. 815, 823-24, 942 P.2d 139, 144-45 (1997) (applying planning-versus-operational test to government action), *abrogated by Martinez*, 123 Nev. at 443-44, 168 P.3d at 726-27; *State v. Silva*, 86 Nev. 911, 913-14, 478 P.2d 591, 592-93 (1970) (applying discretionary-versus-ministerial test to government conduct), *abrogated by Martinez*, 123 Nev. at 443-44, 168 P.3d at 726-27. We also recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009 & n.3, 823 P.2d 888, 892 & n.3 (1991) (plurality opinion). More recently, we adopted the federal two-part test for determining the

applicability of discretionary-function immunity. *Martinez*, 123 Nev. at 444-47, 168 P.3d at 727-29 (adopting test named after two United States Supreme Court decisions: *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). Under the *Berkovitz-Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729. When this court adopted the federal test in *Martinez*, we expressly dispensed with the earlier tests used by this court to determine whether to grant a government entity or its employee immunity, *id.* at 444, 168 P.3d at 727, but we did not address the *Falline* exception to immunity for intentional torts or bad-faith misconduct.

In the earlier writ petitions filed by FTB in this court, we relied on *Falline* to determine that FTB was entitled to immunity from Hyatt's negligence cause of action, but not the remaining intentional-tort-based causes of action. Because the law concerning the application of discretionary-function immunity has changed in Nevada since FTB's writ petitions were resolved, we revisit the application of discretionary-function immunity to FTB in the present case as it relates to Hyatt's intentional tort causes of action. *Hsu v. Cnty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (stating that "the doctrine of the law of the case should not apply where, in the interval between two appeals of a case, there has been a change in the law by ... a judicial ruling entitled to deference" (internal quotations omitted)).

FTB contends that when this court adopted the federal test in *Martinez*, it impliedly overruled the *Falline* exception to discretionary-function immunity for intentional torts and bad-faith misconduct. Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts *or* act in bad faith.

In *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92, this court ruled that the discretionary-function immunity under NRS 41.032(2) did not apply to bad-faith misconduct. The case involved negligent processing of a workers' compensation claim. Falline injured his back at work and later required surgery. *Falline*, 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006-07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide workers' compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to workers' compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his workers' compensation claims. *Id.* at 1006, 823 P.2d at 889-90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

On appeal, after concluding that a self-insured employer should be treated the same as the State Industrial Insurance System, this court concluded that Falline could maintain a lawsuit against the self-insured employer based on negligent handling of his claims. *Id.* at 1007-09, 823 P.2d at 890-92. In discussing its holding, the court addressed discretionary immunity and explained that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Id.* at 1009, 823 P.2d at 891. The court reasoned that the insurer did not have discretion to act in bad faith, and therefore, discretionary-function immunity did not apply to protect the insurer from suit. *Id.* at 1009, 823 P.2d at 891-92.

The *Falline* court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." *Falline,* 107 Nev. at 1009 n.3, 823 P.2d at 892 n.3. The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith "involves an implemented attitude that completely transcends the circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

Following *Falline,* this court adopted, in *Martinez,* the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first step is to determine whether the government

conduct involves judgment or choice. *Id.* at 446-47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert,* 499 U.S. at 322. On the other hand, if an employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test's second step requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis. *Martinez,* 123 Nev. at 445-46, 168 P.3d at 729; *Gaubert,* 499 U.S. at 324. "[E]ven assuming the challenged conduct involves an element of judgment [or choice]," the second step requires the court to determine "whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield." *Gaubert,* 499 U.S. at 322-23. If "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime," discretionary-function immunity will not bar the claim. *Id.* at 324-25. The second step focuses on whether the conduct undertaken is a policymaking decision regardless of the employee's subjective intent when he or she acted. *Martinez,* 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an intentional or bad-faith tort will not

meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

Other courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjective intent to apply broadly or is limited to determining if the decision is a policymaking decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135 (10th Cir. 1999); *see also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). But other courts focus on whether the employee's conduct can be viewed as a policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006); *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003); *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000).[5] These courts bar the application of

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[5] *Coulthurst* is affirmatively cited by the Seventh Circuit Court of Appeals in *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003). Although the Seventh Circuit in *Reynolds*, 549 F.3d at 1112, stated the proposition that claims of malicious and bad-faith conduct were not relevant in determining discretionary immunity because the courts do not look at subjective intent, the *Palay* court specifically held that discretionary immunity can be avoided if the actions were the result of laziness or carelessness because such actions are not policy-based decisions. *Palay*, 349 F.3d at 431-32. *Reynolds* was published after *Palay*, and while it

discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is "unrelated to any plausible policy objective[]." *Coulthurst*, 214 F.3d at 111. A closer look at these courts' decisions is useful for our analysis.

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee's subjective intent

In *Franklin Savings Corp. v. United States*, 180 F.3d at 1127, 1134-42, the Tenth Circuit Court of Appeals addressed the specific issue of whether a claim for bad faith precludes the application of discretionary-function immunity. In that case, following the determination that the Franklin Savings Association was not safe or sound to conduct business, a conservator was appointed. *Id.* at 1127. Thereafter, plaintiffs Franklin Savings Association and its parent company filed suit against defendants the United States government and the conservator to have the conservatorship removed. *Id.* Plaintiffs alleged that the conservator intentionally and in bad faith liquidated the company instead of preserving the company and eventually returning it to plaintiffs to transact business. *Id.* at 1128.

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was intentionally done to

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cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay*.

achieve an improper purpose—to deplete capital and retroactively exculpate the conservator's appointment. *Id.* at 1134. Thus, the court focused on the second part of the federal test. In considering whether the alleged intentional misconduct barred the application of discretionary-function immunity under the federal test, the *Franklin Savings* court first noted that the United States Supreme Court had "repeatedly insisted ... that [tort] claims are not vehicles to second-guess policymaking." *Id.* The court further observed that the Supreme Court's modification to *Berkovitz,* in *Gaubert,* to include a query of whether the nature of the challenged conduct was "susceptible to policy analysis[,] ... served to emphasize that courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions." *Id.* at 1135 (internal quotations omitted). The *Franklin Savings* court ultimately concluded that discretionary-function immunity attaches to bar claims that "depend[] on an employee's bad faith or state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140-41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing

immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141-42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim was not sufficient to overcome discretionary-function immunity's application.

Courts that consider whether an employee subjectively intended to further policy by his or her conduct

Other courts have come to a different conclusion. Most significant is *Coulthurst v. United States*, 214 F.3d 106, in which the Second Circuit Court of Appeals addressed the issue of whether the inspection of weightlifting equipment by prison officials was grounded in policy considerations. In *Coulthurst*, an inmate in a federal prison was injured while using the prison's exercise equipment. *Id.* at 107. The inmate filed suit against the United States government, alleging "'negligence and carelessness'" and a "'fail[ure] to diligently and periodically inspect'" the exercise equipment. *Id.* at 108. The lower court dismissed the complaint, reasoning that the decisions that established the procedures and timing for inspection involved "elements of judgment or choice and a balancing of policy considerations," such that discretionary-function immunity attached to bar liability. *Id.* at 109. Coulthurst appealed.

In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean

different types of negligent or careless conduct. *Id.* The court explained that the complaint asserting negligence or carelessness could legitimately be read to refer to how frequently inspections should occur, which might fall under discretionary-function immunity. *Id.* But the same complaint, the court noted, could also be read to assert negligence and carelessness in the failure to carry out prescribed responsibilities, such as prison officials failing to inspect the equipment out of laziness, haste, or inattentiveness. *Id.* Under the latter reading, the court stated that

> the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the repairs or deal with the paperwork involved in reporting the damage.

Id. The court concluded that such conduct did not involve an element of judgment or choice nor was it based on policy considerations, and in such an instance, discretionary-function immunity does not attach to shield the government from suit. *Id.* at 109-11. In the end, the *Coulthurst* court held that the inmate's complaint sufficiently alleged conduct by prison officials that was not immunized by the discretionary-function immunity exception, and the court vacated the lower court's dismissal and remanded the case for further proceedings. *Id.*

The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly these courts apply the statement in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred ..., but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. *Franklin Savings* interpreted this requirement expansively to preclude any consideration of whether an actor's conduct was done maliciously or in bad faith, whereas *Coulthurst* applied a narrower view of subjective intent, concluding that a complaint alleging a nondiscretionary decision that caused the injury was not grounded in public policy. Our approach in *Falline* concerning immunity for bad-faith conduct is consistent with the reasoning in *Coulthurst* that intentional torts and bad-faith conduct are acts "unrelated to any plausible policy objective[]" and that such acts do not involve the kind of judgment that is intended to be shielded from "judicial second-guessing." 214 F.3d at 111 (internal quotations omitted). We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, "by definition, [cannot] be within the actor's discretion." *Falline,* 107 Nev. at 1009, 823 P.2d at 891-92.

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt's claims. Because we conclude that discretionary-function immunity under NRS 41.032 does not include intentional torts and bad-faith conduct, a Nevada government agency would not

receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

Hyatt's intentional tort causes of action

Given that FTB may not invoke immunity, we turn next to FTB's various arguments contesting the judgment in favor of Hyatt on each of his causes of action.[6] Hyatt brought three invasion of privacy causes of action—intrusion upon seclusion, publicity of private facts, and false light—and additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. We discuss each of these causes of action below.

This court reviews questions of law de novo. *Martinez*, 123 Nev. at 438, 168 P.3d at 724. A jury's verdict will be upheld if it is supported by substantial evidence. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, we "will not reverse an order or judgment unless error is affirmatively shown." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Invasion of privacy causes of action

The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion

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[6] We reject Hyatt's contention that this court previously determined that each of his causes of action were valid as a matter of law based on the facts of the case in resolving the prior writ petitions. To the contrary, this court limited its holding to whether FTB was entitled to immunity, and thus, we did not address the merits of Hyatt's claims.

upon the seclusion of another; or (b) appropriation of the other's name or likeness; or (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977) (citations omitted); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). At issue in this appeal are the intrusion, disclosure, and false light aspects of the invasion of privacy tort. The jury found in Hyatt's favor on those claims and awarded him $52 million for invasion of privacy damages. Because the parties' arguments regarding intrusion and disclosure overlap, we discuss those privacy torts together, and we follow that discussion by addressing the false light invasion of privacy tort.

Intrusion upon seclusion and public disclosure of private facts

On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number to various individuals and entities. FTB contends that Hyatt's claims fail because the information disclosed had been disseminated in prior public records, and thus, could not form the basis of an invasion of privacy claim.

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. *PETA*, 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiffs expectation of privacy must be

objectively reasonable); *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts § 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano,* 99 Nev. at 649, 668 P.2d at 1085. Such materials are public facts, *id.*, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

This court has never limited the application of the public records defense based on the length of time between the public disclosure and the alleged invasion of privacy. In fact, in *Montesano*, 99 Nev. 644, 668 P.2d

1081, we addressed disclosed information contained in a public record from 20 years before the disclosure at issue there and held that the protection still applied. Therefore, under the public records defense, as delineated in *Montesano*, Hyatt is precluded from recovering for invasion of privacy based on the disclosure of his name, address, and social security number, as the information was already publicly available, and he thus lacked an objective expectation of privacy in the information.[7]

Because Hyatt cannot meet the necessary requirements to establish his invasion of privacy causes of action for intrusion upon seclusion and public disclosure of private facts, we reverse the district court's judgment based on the jury verdict as to these causes of action.[8]

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[7] Beyond his name, address, and social security number, Hyatt also alleged improper disclosures related to the publication of his credit card number on one occasion and his licensing contracts on another occasion. But this information was only disclosed to one or two third parties, and it was information that the third parties already had in their possession from prior dealings with Hyatt. Thus, we likewise conclude that Hyatt lacked an objective expectation of privacy as a matter of law. *PETA*, 111 Nev. at 631, 895 P.2d at 1279; *Montesano*, 99 Nev. at 649, 668 P.2d at 1084

[8] Hyatt also argues that FTB violated his right to privacy when its agents looked through his trash, looked at a package on his doorstep, and spoke with neighbors, a postal carrier, and a trash collector. Hyatt does not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to FTB's conduct in these instances, and thus, we decline to consider this contention. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider

False light invasion of privacy

Regarding Hyatt's false light claim, he argues that FTB portrayed him in a false light throughout its investigation because FTB's various disclosures portrayed Hyatt as a "tax cheat." FTB asserts that Hyatt failed to provide any evidence to support his claim. Before reaching the parties' arguments as to Hyatt's false light claim, we must first determine whether to adopt this cause of action in Nevada, as this court has only impliedly recognized the false light invasion of privacy tort. *See PETA*, 111 Nev. at 622 n.4, 629, 895 P.2d at 1273 n.4, 1278. "Whether to adopt [this tort] as [a] viable tort claim[] is a question of state law." *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002).

Adopting the false light invasion of privacy tort

Under the Restatement, an action for false light arises when

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light ... if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

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claims that are not cogently argued or supported by relevant authority).

Restatement (Second) of Torts § 652E (1977). The greatest constraint on the tort of false light is its similarity to the tort of defamation.

A majority of the courts that have adopted the false light privacy tort have done so after concluding that false light and defamation are distinct torts.[9] *See Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007) (explaining the competing views); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (same). For these courts, defamation law seeks to protect an objective interest in one's reputation, "either economic, political, or personal, in the outside world." *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling*, 866 N.E.2d at 1055-57; *West*, 53 S.W.3d at 646. Without recognizing the separate false light

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[9] This court, in *PETA*, while not reaching the false light issue, observed that "'[t]he false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation.'" 111 Nev. at 622 n.4, 895 P.2d at 1274 n.4 (quoting *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)).

privacy tort, such an individual would be left without a remedy. *West*, 53 S.W.3d at 646.

On the other hand, those courts that have declined to adopt the false light tort have done so based on its similarity to defamation. *See, e.g., Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. 1986); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C. 1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). "The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected." *Denver Publ'g Co.*, 54 P.3d at 898. For these courts, tort law serves to deter "socially wrongful conduct," and thus, it needs "clarity and certainty." *Id.* And because the parameters defining the difference between false light and defamation are blurred, these courts conclude that "such an amorphous tort risks chilling fundamental First Amendment freedoms." *Id.* In such a case, a media defendant would have to "anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation." *Id.* at 903. Ultimately, for these courts, defamation, appropriation, and intentional infliction of emotional distress provide plaintiffs with adequate remedies. *Id.* at 903.

Considering the different approaches detailed above, we, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted. Because we now

recognize the false light invasion of privacy cause of action, we address FTB's substantive arguments regarding Hyatt's false light claim.

Hyatt's false light claim

The crux of Hyatt's false light invasion of privacy claim is that FTB's demand-for-information letters, its other contact with third parties through neighborhood visits and questioning, and the inclusion of his case on FTB's litigation roster suggested that he was a "tax cheat," and therefore, portrayed him in a false light. On appeal, FTB argues that Hyatt presented no evidence that anyone thought that he was a "tax cheat" based on the litigation roster or third-party contacts.

FTB's litigation roster was an ongoing monthly litigation list that identified the cases that FTB was involved in. The list was available to the public and generally contained audit cases in which the protest and appeal process had been completed and the cases were being litigated in court. After Hyatt initiated this litigation, FTB began including the case on its roster, which Hyatt asserts was improper because the protests in his audits had not yet been completed. FTB, however, argues that because the lawsuit was ongoing, it did not place Hyatt in a false light by including him on the roster. Further, FTB argues that the litigation roster that Hyatt relied on was not false. When FTB began including Hyatt on the litigation roster, he was not falsely portrayed because he was indeed involved in litigation with FTB in this case. Hyatt did not demonstrate that the litigation roster contained any false information. Rather, he only argued that his inclusion on the list was improper

because his audit cases had not reached the final challenge stage like other cases on the roster.

FTB's contacts with third parties' through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a "tax cheat." In contacting third parties, FTB was merely conducting its routine audit investigations.

The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light. *See Prabhu,* 112 Nev. at 1543, 930 P.2d at 107. Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim.[10]

Having addressed Hyatt's invasion of privacy causes of action, we now consider FTB's challenges to Hyatt's remaining causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress.

Breach of confidential relationship

A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan,* 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential relationship. In the underlying case, the district court denied FTB's

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[10] Based on this resolution, we need not address the parties' remaining arguments involving this cause of action.

motion for summary judgment and its motion for judgment as a matter of law, which presented similar arguments, and at trial the jury found FTB liable on this cause of action. Hyatt argues that his claim for breach of confidentiality falls within the parameters of *Perry* because FTB promised to protect his confidential information and its position over Hyatt during the audits established the necessary confidential relationship.[11]

In *Perry*, this court recognized that a confidential relationship exists when a party gains the confidence of another party and purports to advise or act consistently with the other party's interest. *Id.* at 947, 900 P.2d at 338. In that case, store owner Perry sold her store to her neighbor and friend, Jordan, knowing that Jordan had no business knowledge, that Jordan was buying the store for her daughters, not for herself, and that Jordan would rely on Perry to run the store for a contracted one-year period after the sale was complete. *Id.* at 945-46, 900 P.2d at 336-37. Not long after the sale, Perry stopped running the store, and the store eventually closed. *Id.* at 946, 900 P.2d at 337. Jordan filed suit against Perry for, among other things, breach of a confidential relationship. *Id.* A jury found in Jordan's favor and awarded damages. *Id.* Perry appealed, arguing that this court had not

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[11] FTB initially argues that Hyatt attempts to blend the cause of action recognized in *Perry* with a separate breach of confidentiality cause of action that, while recognized in other jurisdictions, has not been recognized by this court. We reject this contention, as the jury was instructed based on the cause of action outlined in *Perry*.

recognized a claim for breach of a confidential relationship. *Id.*

On appeal, this court ruled that a breach of confidential relationship claim was available under the facts of the case. *Id.* at 947, 900 P.2d at 338. The court noted that Perry "held a duty to act with the utmost good faith, based on her confidential relationship with Jordan[,and that the] duty requires affirmative disclosure and avoidance of self dealing." *Id.* at 948, 900 P.2d at 338. The court explained that "[w]hen a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." *Id.* at 947, 900 P.2d at 338.

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in *Perry* to establish a breach of confidential relationship cause of action. In support of this proposition, FTB cites to *Johnson v. Sawyer,* which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir. 1995) (en banc). In *Johnson,* the plaintiff sought damages from press releases by the Internal Revenue Service (IRS) based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718-19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718-20. Following the plea agreement, two press releases were issued that contained improper and private information about Johnson. *Id.* at 720-21. Johnson filed suit against the

IRS based on these press releases, arguing that they cost him his job and asserting several causes of action, one being breach of a confidential relationship. *Id.* at 718, 725, 738. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling that a breach of a confidential relationship could not be maintained based on the relationship between Johnson and the IRS, as it was clear that the two parties "stood in an adversarial relationship." *Id.* at 738 n.47.

Hyatt rejects FTB's reliance on this case, arguing that the *Johnson* ruling is inapposite to the present case because, here, FTB made express promises regarding protecting Hyatt's confidential information but then failed to keep those promises. Hyatt maintains that although FTB may not have acted in his best interest in every aspect of the audits, as to keeping his information confidential, FTB affirmatively undertook that responsibility and breached that duty by revealing confidential information.

But in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather, it had a duty to proceed on behalf of the state of California's interest. *Johnson,* 47 F.3d at 738 n.47. Moreover, the parties' relationship was not akin to a family or business relationship. *Perry,* 111 Nev. at 947, 900 P.2d at 337-38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry,* but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim

for a breach of confidential relationship.[12] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district court judgment in Hyatt's favor on this claim is reversed.

Abuse of process

A successful abuse of process claim requires "'(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.'" *LaMantia v. Redisi,* 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Posadas v. City of Reno,* 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993)). Put another way, a plaintiff must show that the defendant "willfully and improperly *used the legal process* to accomplish" an ulterior purpose other than resolving a legal dispute. *Id.* at 31, 38 P.3d at 880 (emphasis added).

FTB asserts that it was entitled to judgment as a matter of law on Hyatt's abuse of process cause of action because it did not actually use the judicial process, as it never sought to judicially enforce compliance with the demand-for-information forms and did not otherwise use the judicial process in conducting its audits of Hyatt. In response, Hyatt

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[12] Further, we note that the majority of cases that Hyatt cites as authority for a more expansive viewpoint of a confidential relationship involve claims arising from a doctor-patient confidentiality privilege, which does not apply here. *See, e.g., Doe v. Medlantic Health Care Grp., Inc.,* 814 A.2d 939, 950-51 (D.C. 2003); *Humphers v. First Interstate Bank of Or.,* 696 P.2d 527, 533-35 (Or. 1985).

argues that FTB committed abuse of process by sending demand-for-information forms to individuals and companies in Nevada that are not subject to the California law cited in the form.

Because FTB did not use any legal enforcement process, such as filing a court action, in relation to its demands for information or otherwise during the audits, Hyatt cannot meet the requirements for establishing an abuse of process claim. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880; *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 644 (Ct. App. 2001) (explaining that abuse of process only arises when there is actual "use of *the machinery of the legal system* for an ulterior motive" (internal quotations omitted)); *see also Tuck Beckstoffer Wines L.L.C. v. Ultimate Distribs., Inc.*, 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 697-98, 962 P.2d 596, 600-01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial evidence.

Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

When Hyatt's 1991 audit began, FTB informed him that during the audit process Hyatt could expect FTB employees to treat him with courtesy, that the auditor assigned to his case would clearly and concisely request information from him, that any personal and financial information that he provided to FTB would be treated confidentially, and that the audit would be completed within a reasonable time. FTB contends that its statements in documents to Hyatt, that it would provide him with courteous treatment and keep his information confidential, were insufficient representations to form a basis for a fraud claim, and even if the representations were sufficient, there was no evidence that FTB knew that they were false when made. In any case, FTB argues that Hyatt did not prove any reliance because he was required to participate in the audits whether he relied on these statements or not. Hyatt asserts that FTB knowingly misrepresented its promise to treat him fairly and impartially and to protect his private information. For the reasons discussed below, we reject FTB's argument that it was entitled to judgment as a matter of law on Hyatt's fraud claim.

The record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB

represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence. Furthermore, Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California. Also at trial, Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken. Hyatt also testified that he would not have hired legal and accounting professionals to assist in the audits had he known how he would be treated. Moreover, Hyatt stated that he incurred substantial costs that he would not otherwise have incurred by paying for professional representatives to assist him during the audits.

The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the

representations were false, and that it intended for Hyatt to rely on the representations.[13] What's more, the jury could reasonably conclude that Hyatt relied on FTB's representations to act and participate in the audits in a manner different than he would have otherwise, which resulted in damages. Based on this evidence, we conclude that substantial evidence supports each of the fraud elements and that FTB is not entitled to judgment as a matter of law on this cause of action.[14]

Fraud damages

Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his

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[13] FTB's argument concerning government agents making representations beyond the scope of law is without merit.

[14] FTB further argues that several evidentiary errors by the district court warrant a new trial. These errors include admitting evidence concerning whether the audit conclusions were correct and excluding FTB's evidence seeking to rebut an adverse inference for spoliation of evidence. FTB also asserts that the district court improperly instructed the jury by permitting it to consider the audit determinations. Although we agree with FTB that the district court abused its discretion in these evidentiary rulings and in its jury instruction number 24, as discussed more fully below in regard to Hyatt's intentional infliction of emotional distress claim, we conclude that these errors were harmless as to Hyatt's fraud claim because sufficient evidence of fraud existed for the jury to find in Hyatt's favor on each required element for fraud. *See Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction, "prejudice must be established in order to reverse a district court judgment," and this is done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand).

fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[15] In doing so, we address whether FTB is entitled to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[16] NRS 41.035 provides a statutory cap on liability damages in tort actions "against a present or former officer or employee of the State or any political subdivision." FTB argues that because it is immune from liability under California law, and Nevada provides a statutory cap on liability damages, it is entitled to the statutory cap on its liability to the extent that the law does not conflict with Nevada policy. Hyatt asserts that applying the statutory caps would in fact violate Nevada policy because doing so would not sufficiently protect Nevada residents. According to Hyatt, limitless compensatory damages are necessary as a means to control non-Nevada government actions. Hyatt claims that statutory caps

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[15] The jury verdict form included a separate damage award for Hyatt's fraud claim. We limit our discussion of Hyatt's fraud damages to these special damages that were awarded. To the extent that Hyatt argues that he is entitled to other damages for his fraud claim beyond the special damages specified in the jury verdict form, we reject this argument and limit any emotional distress damages to his recovery under his intentional infliction of emotional distress claim, as addressed below.

[16] FTB argues that under the law-of-the-case doctrine, comity applies to afford it a statutory cap on damages and immunity from punitive damages based on this court's conclusions in the earlier writ petitions. But this court did not previously address these issues and the issues are different, thus, law of the case does not apply. *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 44-45, 223 P.3d 332, 334-35 (2010).

for Nevada government actions work because Nevada can control its government entities and employees through other means, such as dismissal or other discipline, that are not available to control an out-of-state government entity. Additionally, Hyatt points out that there are other reasons for the statutory caps that are specific only to Nevada, such as attracting state employees by limiting potential liability. Therefore, Hyatt argues that FTB is not entitled to statutory caps under comity because it would violate Nevada's superior policy of protecting its residents from injury.

The parties base their arguments on precedent from other courts that have taken different approaches to the issue. FTB primarily relies on a New Mexico Supreme Court case, *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006), and Hyatt supports his arguments by mainly relying on *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala. 1992).

In *Sam*, an employee of an Arizona government entity accidentally backed over his child while driving his employer's vehicle at his home in New Mexico. 134 P.3d at 763. In a lawsuit arising out of this accident, the issue before the *Sam* court was whether Arizona's one-year statute of limitation for government employees, or New Mexico's two-year statute of limitation for government employees or three-year general tort statute of limitation law should apply. *Id.* at 764. The court discussed the comity doctrine and concluded that New Mexico's two-year statute of limitations for government employees applied because by doing so it was recognizing Arizona's law to the

extent that it did not conflict with New Mexico's law. *Id.* at 764-68.

In reaching this conclusion, the *Sam* court relied on the United States Supreme Court's holdings in *Nevada v. Hall*, 440 U.S. 410 (1979), and *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003). *Sam*, 134 P.3d at 765-66. The *Sam* court stated that "[b]oth these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies." *Id.* at 765. Based on this framework for comity, the *Sam* court concluded that Arizona should be entitled to the statute of limitations for government agencies that New Mexico would provide to its government agencies. Most courts appear to follow FTB's argument regarding how comity applies and that a state should recognize another state's laws to the extent that they do not conflict with its own. *See generally Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Illinois*, 748 A.2d 1105, 1107 (N.J. 2000); *Sam*, 134 P.3d at 765; *Hansen v. Scott*, 687 N.W.2d 247, 250 (N.D. 2004).

In *Faulkner*, the plaintiff filed a lawsuit against the University of Tennessee after it threatened to revoke plaintiff's doctoral degree. 627 So. 2d at 363-64. The issue in *Faulkner* was whether the University of Tennessee (UT) was entitled to discretionary immunity under comity, when both Tennessee and Alabama had similar discretionary-immunity provisions for their states' government entities. *Id.* at

366. Considering the policy of allowing residents legal redress, compared to the immunity policies that both states had, the *Faulkner* court observed that

> [w]e cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State, where those alleged acts are associated with substantial commercial activities in Alabama. We conclude that comity is not such an overriding policy in this instance.

Id. The court rejected the argument that granting comity would not violate Alabama policy because its residents were used to Alabama government entities receiving immunity:

> Agencies of the State of Alabama are subject to legislative control, administrative oversight, and public accountability in Alabama; UT is not. Actions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in Alabama. UT, as an instrumentality of the State of Tennessee, operates outside such controls in this State.

Id. The *Faulkner* court ultimately declined to grant UT immunity under comity. We are persuaded by the *Faulkner* court's reasoning.

This state's policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity. Therefore, as we conclude that allowing FTB a statutory cap would violate this state's public policy in this area, comity does not require this court to grant

FTB such relief. *Id.*; *Sam*, 134 P.3d at 765 (recognizing that a state is not required to extend immunity and comity only dictates doing so if it does not contradict the forum state's public policy). As this is the only argument FTB raised in regard to the special damages awarded under the fraud cause of action, we affirm the amount of damages awarded for fraud. The prejudgment interest awarded is vacated and remanded to the district court for a recalculation based on the damages for fraud that we uphold. In light of our ruling that only the special award of damages for fraud is affirmed, FTB's argument that prejudgment interest is not allowed because future damages were interwoven with past damages is moot.

Intentional infliction of emotional distress

During discovery in the underlying case, Hyatt refused to disclose his medical records. As a result, he was precluded at trial from presenting any medical evidence of severe emotional distress. Nevertheless, at trial, Hyatt presented evidence designed to demonstrate his emotional distress in the form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in Hyatt's behavior and health during the audits. Based on this testimony, the jury found in Hyatt's favor on his intentional infliction of emotional distress (IIED) claim and awarded him $82 million for emotional distress damages.

To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress;

(3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable indicia'" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller*, 114 Nev. at 1300, 970 P.2d at 577.

On appeal, FTB argues that Hyatt failed to establish that he actually suffered severe emotional distress because he failed to provide any medical evidence or other objectively verifiable evidence to establish such a claim. In response, Hyatt contends that the testimony provided by his family and other acquaintances sufficiently established objective proof of the severe and extreme emotional distress he suffered, particularly in light of the facts of this case demonstrating the intentional harmful treatment he endured from FTB. Hyatt asserts that the more severe the harm, the lower the amount of proof necessary to establish that he suffered severe emotional distress. While this court has held that objectively verifiable evidence is necessary in order to establish an IIED claim, *id.*, we have not specifically addressed whether this necessarily requires medical evidence or if other objective evidence is sufficient.

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased severity of the conduct will require less in the way of proof that emotional distress was suffered in order to establish an IIED claim. Restatement (Second) of Torts § 46 cmt. j (1977) ("The

intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."); Restatement (Second) of Torts § 46 cmt. k (1977) (stating that "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required"). This court has also impliedly recognized this sliding-scale approach, although stated in the reverse. *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983). In *Nelson*, this court explained that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Id.* at 555, 665 P.2d at 1145.

Further, other jurisdictions that require objectively verifiable evidence have determined that such a mandate does not always require medical evidence. *See Lyman v. Huber*, 10 A.3d 707 (Me. 2010) (stating that medical testimony is not mandatory to establish an IIED claim, although only in rare, extreme circumstances); *Ruckman-Peirson v. Brannon*, 822 N.E.2d 830, 840-41 (Ohio Ct. App. 2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiffs own testimony was necessary); *see also Dixon v. Denny's, Inc.*, 957 F. Supp. 792, 796 (E.D. Va. 1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234

(1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374-75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374-75, 725 P.2d at 236. In so holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's

conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

Turning to the facts in the present case, Hyatt suffered extreme treatment from FTB. As explained above in discussing the fraud claim, FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of $8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

In support of his IIED claim, Hyatt presented testimony from three different people as to the how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional

distress.[17] Accordingly, we affirm the judgment in favor of Hyatt on this claim as to liability. As discussed below, however, we reverse the award of damages on this claim and remand for a new trial as to damages on this claim only.

A new trial is warranted based on evidentiary and jury instruction errors[18]

Early in this case, the district court granted FTB partial summary judgment and dismissed Hyatt's declaratory relief cause of action concerning when he moved from California to Nevada. The district court reached this conclusion because the audits were still under review in California, and therefore, the Nevada court lacked jurisdiction to address whether the audits' conclusions were accurate. The partial summary judgment was not challenged by Hyatt at any point to this court, and thus, the district court's ruling was in effect throughout the trial. Consequently, whether the audits' determinations were correct was not an issue in the Nevada litigation.

On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction

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[17] To the extent FTB argues that it was prejudiced by its inability to obtain Hyatt's medical records, we reject this argument as the rulings below on this issue specifically allowed FTB to argue to the jury the lack of any medical treatment or evidence by Hyatt.

[18] While we conclude, as discussed below, that evidentiary and jury instruction errors require a new trial as to damages on Hyatt's IIED claim, we hold that sufficient evidence supports the jury's finding as to liability on this claim regardless of these errors. Thus, these errors do not alter our affirmance as to liability on this claim.

that went directly to whether the audits were properly determined. FTB frames this issue as whether the district court exceeded the case's jurisdictional boundaries, but the issue more accurately involves the admissibility of evidence and whether a jury instruction given by the district court was proper in light of the jurisdictional ruling. We review both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion. *See Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (evidence); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (jury instruction).

Evidence improperly permitted challenging audits' conclusions

FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's representatives' cooperation during the audits to refute the lack of cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation

that Hyatt's actions of living in a low-income apartment building in Las Vegas and having no security were "implausible behaviors"; and especially, (4) expert testimony of former FTB agent Malcom Jumulet regarding audit procedures, and Jumulet's testimony as to how FTB analyzed and weighed the information obtained throughout the audits as challenging the results of the audits reached by FTB. Further, FTB points to Hyatt's arguments regarding an alleged calculation error as to the amount of taxable income, which FTB argues is an explicit example of Hyatt challenging the conclusions of the audits. Hyatt argues that all the evidence he presented did not challenge the audits, but was proffered to demonstrate that the audits were conducted in bad faith and in an attempt to "trump up a case against Hyatt and extort a settlement."

While much of the evidence presented at trial would not violate the restriction against considering the audits' conclusions, there are several instances in which the evidence does violate this ruling. These instances included evidence challenging whether FTB made a mathematical error in the amount of income that it taxed, whether an auditor improperly gave credibility to certain interviews of estranged family members, whether an auditor appropriately determined that certain information was not credible or not relevant, as well as the testimony outlined above that Hyatt presented, which challenged various aspects of the fraud penalties.

The expert testimony regarding the fraud penalties went to the audits' determinations and had no utility in showing any intentional torts unless it

was first concluded that the audits' determinations were incorrect. For example, the expert testimony concerning typical lifestyles of wealthy individuals had relevance only to show that FTB erroneously concluded that Hyatt's conduct, such as renting an apartment in a low-income complex, was fraudulent because he was wealthy and allegedly only rented the apartment to give the appearance of living in Nevada. Whether such a conclusion was a correct determination by FTB is precisely what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was proven that FTB knew wealthy individuals' tendencies, that they applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen*, 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

FTB also argues that the district court wrongly instructed the jury. Specifically, it asserts that the jury instruction given at the end of trial demonstrates that the district court allowed the jury to improperly consider FTB's audit determinations. Hyatt counters FTB's argument by relying on an earlier instruction that was given to the jury that he argues shows that the district court did not allow the jury to determine

the appropriateness of the audits' results, as it specifically instructed the jury not to consider the audits' conclusions.

As background, before trial began, and at various times during the trial, the district court read an instruction to the jury that it was not to consider whether the audits' conclusions were correct:

> Although this case arises from the residency tax audit conducted by FTB, it is important for you to understand that you will not be asked, nor will you be permitted to make any determinations related to Mr. Hyatt's residency or the correctness of the tax assessments, penalties and interest assessed by FTB against Mr. Hyatt. Thus, although you may hear evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments, you are not permitted to make any determinations regarding Mr. Hyatt's residency such as when he became or did not become a resident of Nevada.

When jury instructions were given, this instruction was intended to be part of the jury instructions, but somehow the instruction was altered and a different version of this instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax

assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted to make any determinations related to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.

The residency and tax assessment determinations, and all factual and legal issues related thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.

Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis*

> *conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.*

(Emphasis added.) Based on the italicized language, FTB argues that the district court not only allowed, but invited the jury to consider whether the FTB's audit conclusions were correct.

Jury Instruction 24 violated the jurisdictional limit that the district court imposed on this case. The instruction specifically allowed the jury to consider the "appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." As a result, the district court abused its discretion in giving this jury instruction. *Allstate Ins. Co.*, 125 Nev. at 319, 212 P.3d at 331.

Exclusion of evidence to rebut adverse inference

FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its e-mail server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple e-mails to its employees, before the change, requesting that they print or otherwise save any e-mails related to Hyatt's case.

Backup tapes containing several weeks' worth of e-mails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in e-mail servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an adverse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See, e.g., Bass-Davis v. Davis*, 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant e-mails before the server change. Hyatt challenged this evidence, arguing that it was merely an attempt to reargue the evidence spoliation. The district court agreed with Hyatt and excluded the evidence. FTB does not challenge the jury instruction, but it does challenge the district court's exclusion of evidence that it sought to present at trial to rebut the adverse inference.

On this point, FTB argues that it was entitled to rebut the adverse inference, and therefore, the district court abused its discretion in excluding the rebuttal evidence. Hyatt counters that it is not proper evidence because in order to rebut the inference FTB had to show that the destroyed evidence was not harmful and

FTB's excluded evidence did not demonstrate that the destroyed e-mails did not contain anything harmful.

This court has recognized that a district court may impose a rebuttable presumption, under NRS 47.250(3), when evidence was willfully destroyed, or the court may impose a permissible adverse inference when the evidence was negligently destroyed. *Bass-Davis*, 122 Nev. at 447-48, 134 P.3d at 106-07. Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable. 122 Nev. at 448, 134 P.3d at 107. If the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. *Id.* A lesser adverse inference, that does not shift the burden of proof, is permissible. *Id.* at 449, 134 P.3d at 107. The lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. *Id.*

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district court nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant emails in an effort to demonstrate that none of the destroyed information contained in the e-mails was damaging to FTB. Because the district court did not allow FTB to explain the steps taken, we are not persuaded by Hyatt's contention that FTB's evidence was actually

only an attempt to reargue the spoliation issue. To the contrary, FTB could use the proposed evidence related to its efforts to collect all relevant e-mails to explain why nothing harmful was destroyed. Therefore, we conclude that the district court abused its discretion in excluding the evidence, and we reverse the district court's ruling in this regard.

Other evidentiary errors

FTB additionally challenges the district court's exclusion of evidence regarding Hyatt's loss of his patent through a legal challenge to the validity of his patent and his being audited for his federal taxes by the IRS, both of which occurred during the relevant period associated with Hyatt's IIED claim. Hyatt asserts that the district court properly excluded the evidence because it was more prejudicial than probative.

Under NRS 48.035(1), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice .... " Hyatt argues that this provides a basis for the district court's exclusion of this evidence. We conclude, however, that the district court abused its discretion in excluding the evidence of Hyatt's patent loss and federal tax audit on this basis. Although the evidence may be prejudicial, it is doubtful that it is *unfairly* prejudicial as required under the statute. And in any event, the probative value of this evidence as to Hyatt's IIED claim, in particular in regard to damages caused by FTB as opposed to other events in his life, is more probative than unfairly prejudicial. Accordingly, the district court abused its discretion in excluding this evidence.

Evidentiary and jury instruction errors warrant reversal and remand for a new trial on damages only on the IIED claim

Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, the question becomes whether these errors warrant reversal and remand for a new trial on the IIED claim, or whether the errors were harmless such that the judgment on the IIED claim should be upheld. *See Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction "prejudice must be established in order to reverse a district court judgment," which can be done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand). We hold that substantial evidence exists to support the jury's finding as to liability against FTB on Hyatt's IIED claim regardless of these errors, but we conclude that the errors significantly affected the jury's determination of appropriate damages, and therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages.

In particular, the record shows that at trial Hyatt argued that FTB promised fairness and impartiality in its auditing processes but then, according to Hyatt, proceeded to conduct unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt to extort him." In connection with this argument, Hyatt asserted that the penalties FTB

imposed against Hyatt were done "to better bargain for and position the case to settle." Hyatt also argued that FTB unfairly refused to correct a mathematical error in the amount assessed against him when FTB asserted that there was no error.

None of these assertions could be made without contesting the audits' conclusions and determining that they were incorrect, which Hyatt was precluded from doing. Further, excluding FTB's evidence to rebut the adverse inference was prejudicial because Hyatt relied heavily on the adverse inference, and it is unknown how much weight the jury gave the inference in making its damages findings. The exclusion of evidence concerning Hyatt's loss of his patent and his federal tax audit, both occurring during the relevant period, relate to whether Hyatt's emotional distress was caused by FTB's conduct or one of these other events. As for the jury instruction, Instruction 24 gave the jury permission to consider the audits' determinations, which the district court had previously precluded it from reaching. As such, all of these errors resulted in prejudice to FTB directly related to the amount of damages Hyatt may be entitled to on his IIED claim. Therefore, a new trial as to the IIED damages is warranted.

Recoverable damages on remand

As addressed above in regard to damages for Hyatt's fraud claim, we reject FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities under comity principles. Based on our above analysis on this issue, we conclude that providing statutory caps on damages under comity would conflict with our state's policy

interest in providing adequate redress to Nevada citizens. Thus, comity does not require this court to grant FTB such relief. *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362, 366 (Ala. 1992); *see also Sam v. Estate of Sam*, 134 P.3d 761, 765 (N.M. 2006) (recognizing that a state is not required to extend immunity and comity, and only dictating doing so if it does not contradict the forum state's public policy). As a result, any damages awarded on remand for Hyatt's IIED claim are not subject to any statutory cap on the amount awarded. As to FTB's challenges concerning prejudgment interest in connection with Hyatt's emotional distress damages, these arguments are rendered moot by our reversal of the damages awarded for a new trial and our vacating the prejudgment interest award.

Punitive damages

The final issue that we must address in FTB's appeal is whether Hyatt can recover punitive damages from FTB. The district court allowed the issue of punitive damages to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). But "[t]he general rule is that no punitive damages are allowed against a [government entity] unless *expressly* authorized by statute." *Long v. City of Charlotte*, 293 S.E.2d 101, 114 (N.C. 1982) (emphasis added). In Nevada, NRS 41.035(1) provides that "[a]n award for damages [against a government entity] in an action sounding in tort ... may not include any amount as exemplary or punitive." Thus, Nevada has

not waived its sovereign immunity from suit for such damages.

FTB argues that it is entitled to immunity from punitive damages based on comity because, like Nevada, California law has expressly waived such damages against its government entities. California law provides full immunity from punitive damages for its government agencies. Cal. Gov't Code § 818 (West 2012). Hyatt maintains that punitive damages are available against an out-of-state government entity, if provided for by statute, and Nevada has a statute authorizing such damages—NRS 42.005.[19]

NRS 42.005(1) provides that punitive damages may be awarded when a defendant "has been guilty of oppression, fraud or malice, express or implied." Hyatt acknowledges that punitive damages under NRS 42.005 are not applicable to a Nevada government entity based on NRS 41.035(1), but he contends that because FTB is not a Nevada government agency, the protection against punitive damages for Nevada agencies under NRS 41.035(1) does not apply, and thus, FTB comes within NRS 42.005's purview. FTB counters by citing a federal district court holding,

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[19] Hyatt also argues that punitive damages are proper because the IRS is subject to punitive damages for conduct similar to that alleged here under the IRS code, 26 U.S.C. § 7431(c)(1)(B)(ii) (2012), which allows for punitive damages for intentional or grossly negligent disclosure of a private taxpayer's information. Thus, Hyatt maintains that it is reasonable to impose punitive damages against FTB when the federal law permits punitive damages against the IRS for similar conduct. *Id.* But as FTB points out, this argument fails because there is a statute that expressly allows punitive damages against the IRS, and such a statute does not exist here.

Georgia v. City of East Ridge, Tennessee, 949 F. Supp. 1571, 1581 (N.D. Ga. 1996), in which the court concluded that a Tennessee government entity could not be held liable for punitive damages under Georgia state law (which applied to the case) because, even though Georgia law had a statute allowing punitive damages, Georgia did not allow such damages against government entities. Therefore, the court gave the Tennessee government entity the protection of this law. *Id.*

The broad allowance for punitive damages under NRS 42.005 does not authorize punitive damages against a government entity. Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1). Thus, Hyatt's argument that Nevada law provides for the award of punitive damages against FTB is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. We therefore reverse the portion of the district court's judgment awarding punitive damages against FTB.

Costs

Since we reverse Hyatt's judgments on several of his tort causes of action, we must reverse the district court's costs award and remand the costs issue for the district court to determine which party, if any, is the prevailing party based on our rulings. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) (stating that the reversal of costs award is required when this court reverses the

underlying judgment); *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (upholding the district court's determination that neither party was a prevailing party because each party won some issues and lost some issues). On remand, if costs are awarded, the district court should consider the proper amount of costs to award, including allocation of costs as to each cause of action and recovery for only the successful causes of action, if possible. *Cf. Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (holding that the district court should apportion costs award when there are multiple defendants, unless it is "rendered impracticable by the interrelationship of the claims"); *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

Because this issue is remanded to the district court, we also address FTB's challenges on appeal to the procedure used by the district court in awarding costs. Hyatt moved for costs after trial, which FTB opposed. FTB's opposition revolved in part around its contention that Hyatt failed to properly support his request for costs with necessary documentation as to the costs incurred. The district court assigned the costs issue to a special master. During the process, Hyatt supplemented his request for costs on more than one occasion to provide additional documentation to support his claimed costs. After approximately 15 months of discovery, the special master issued a recommendation to award Hyatt approximately $2.5 million in costs. FTB sought to challenge the special

master's recommendation, but the district court concluded that FTB could not challenge the recommendation under the process used, and the court ultimately adopted the special master's recommendation.

FTB argues that Hyatt was improperly allowed to submit, under NRS 18.110, documentation to support the costs he sought after the deadline. This court has previously held that the five-day time limit established for filing a memorandum for costs is not jurisdictional because the statute specifically allows for "such further time as the court or judge may grant" to file the costs memorandum. *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). In *Eberle*, this court stated that even if no extension of time was granted by the district court, the fact that it favorably awarded the costs requested demonstrated that it impliedly granted additional time. *Id.* The *Eberle* court ruled that this was within the district court's discretion and would not be disturbed on appeal. *Id.* Based on the *Eberle* holding, we reject FTB's contention that Hyatt was improperly allowed to supplement his costs memorandum.

FTB also contends that the district court erred when it refused to let FTB file an objection to the master's report and recommendation. The district court concluded that, under NRCP 53(e)(3), no challenge was permitted because there was a jury trial. While the district court could refer the matter to a special master, the district court erroneously determined that FTB was not entitled to file an objection to the special master's recommendation. Although this case was a jury trial, the costs issue was

not placed before the jury. Therefore, NRCP 53(e)(2) applied to the costs issue, not NRCP 53(e)(3). NRCP 53(e)(2) specifically provides that "any party may serve written objections" to the master's report. Accordingly, the district court erred when it precluded FTB from filing its objections. On remand, if the district court concludes that Hyatt is still entitled to costs, the court must allow FTB to file its objections to the report before the court enters a cost award. Based on our reversal and remand of the costs award, and our ruling in this appeal, we do not address FTB's specific challenges to the costs awarded to Hyatt, as those issues should be addressed by the district court, if necessary, in the first instance.

Hyatt's cross-appeal

The final issues that we must resolve concern Hyatt's cross-appeal. In his cross-appeal, Hyatt challenges the district court's summary judgment ruling that prevented him from seeking economic damages as part of his recovery for his intentional tort claims.

As background, during the first audit, FTB sent letters to two Japanese companies with whom Hyatt had patent-licensing agreements asking the companies for specific dates when any payments were sent to Hyatt. Both companies responded to the letters and provided the requested information. In the district court, Hyatt argued that sending these letters to the Japanese companies was improper because they revealed that Hyatt was being audited by FTB and that he had disclosed the licensing agreements to FTB. Hyatt theorized that he suffered economic damages by losing millions of dollars of potential licensing revenue

because he alleges that the Japanese market effectively abandoned him based on the disclosures. FTB moved the district court for summary judgment to preclude Hyatt from seeking economic loss damages, arguing that Hyatt did not have sufficient evidence to present this claim for damages to the jury. The district court agreed and granted FTB summary judgment.

Damages "cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). This is true regardless of "'whether the testimony comes from the mouth of a lay witness or an expert.'" *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (quoting *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991)). When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." *Horgan v. Indart*, 41 Nev. 228, 231, 168 P. 953, 953 (1917); *see also Frantz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351, 359 (2000). A party cannot use one inference to support another inference; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. *Horgan*, 41 Nev. at 231, 168 P. at 953. Thus, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed." *Id.*

Here, Hyatt argued that as a result of FTB sending letters to the two Japanese companies inquiring about licensing payments, the companies in turn would have notified the Japanese government

about FTB investigating Hyatt. Hyatt theorized that the Japanese government would then notify other Japanese businesses about Hyatt being under investigation, with the end result being that the companies would not conduct any further licensing business with Hyatt. Hyatt's evidence to support this alleged chain of events consisted of the two letters FTB sent to the two companies and the fact that the companies responded to the letters, the fact that his licensing business did not obtain any other licensing agreements after the letters were sent, and expert testimony regarding Japanese business culture that was proffered to establish this potential series of events.

Hyatt claims that the district court erroneously ruled that he had to present direct evidence to support his claim for damages, *e.g.*, evidence that the alleged chain of events actually occurred and that other companies in fact refused to do business with Hyatt as a result. Hyatt insists that he had sufficient circumstantial evidence to support his damages, and in any case, asserts that circumstantial evidence alone is sufficient and that causation requirements are less stringent and can be met through expert testimony under the circumstances at issue here. FTB responds that the district court did not rule that direct evidence was required, but instead concluded that Hyatt's evidence was speculative and insufficient. FTB does not contest that damages can be proven through circumstantial evidence, but argues that Hyatt did not provide such evidence. It also argues that there is no different causation standard under the facts of this case.

The issue we must decide is whether Hyatt set forth sufficient circumstantial evidence to support his economic damages claim, or if the evidence he presented was instead either too speculative or failed to create a sufficient question of material fact as to his economic damages. To begin with, we reject Hyatt's contention that reversal is necessary because the district court improperly ruled that direct evidence was mandatory. Hyatt's limited view of the district court's ruling is unavailing.

The ultimate fact that Hyatt seeks to establish through circumstantial evidence, that the downfall of his licensing business in Japan resulted from FTB contacting the two Japanese companies, however, cannot be proven through reliance on multiple inferences—the other facts in the chain must be proven. Here, Hyatt only set forth expert testimony detailing what his experts believed would happen based on the Japanese business culture. No evidence established that any of the hypothetical steps actually occurred. Hyatt provided no proof that the two businesses that received FTB's letters contacted the Japanese government, nor did Hyatt prove that the Japanese government in turn contacted other businesses regarding the investigation of Hyatt. Therefore, Hyatt did not properly support his claim for economic damages with circumstantial evidence. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005) (recognizing that to avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating

the existence of a genuine issue of material fact for trial); *see* NRCP 56(e). Accordingly, summary judgment was proper and we affirm the district court's summary judgment on this issue.

CONCLUSION

Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt's causes of action except for his fraud and IIED claims. As to the fraud claim, we affirm the district court's judgment in Hyatt's favor, and we conclude that the district court's evidentiary and jury instruction errors were harmless. We also uphold the amount of damages awarded, as we have determined that FTB is not entitled to a statutory cap on damages under comity principles because this state's interest in providing adequate relief to its citizens outweighs providing FTB with the benefit of a damage cap under comity. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability, but conclude that evidentiary and jury instruction errors require a new trial as to damages. Any damages awarded on remand are not subject to a statutory cap under comity. We nevertheless hold that Hyatt is precluded from recovering punitive damages against FTB. The district court's judgment is therefore affirmed in part and reversed and remanded in part. We also remand the prejudgment interest and the costs awards to the district court for a new determination in light of this opinion. Finally, we affirm the district court's prior summary judgment as to Hyatt's claim for economic damages on Hyatt's cross-appeal. Given our resolution

of this appeal, we do not need to address the remaining arguments raised by the parties on appeal or cross-appeal.

s/_____, J.
Hardesty

We concur:

s/_____, C.J.
Gibbons

s/_____, J.
Pickering

s/_____, J.
Parraguirre

s/_____, J.
Douglas

s/_____, J.
Cherry

Appendix B

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/ Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/ Cross-Appellant.

Filed: November 25, 2014

ORDER DENYING PETITIONS FOR REHEARING

Having considered the parties' petitions for rehearing and the answers thereto, we deny both petitions. NRAP 40(c).

It is so ORDERED.[1]

s/ Gibbons	C.J.	s/ Pickering	J.
s/ Hardesty	J.	s/ Parraguirre	J.
s/ Douglas	J.	s/ Cherry	J.

[1] The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.

Appendix C

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant/
Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/
Cross-Appellant.

Filed: January 2, 2015

ORDER STAYING REMITTITUR

Appellant/cross-respondent has moved to stay issuance of the remittitur pending the filing of a petition for a writ of certiorari with the United States Supreme Court. We grant the motion. *See* NRAP 41(b). We hereby stay issuance of the remittitur until April 22, 2015. If the clerk of this court receives written notice by April 22, 2015, from the clerk of the United States Supreme Court that appellant/cross-respondent has filed a petition for a writ of certiorari, the stay shall continue in effect until final disposition of the certiorari proceedings. If such notice is not

received by April 22, 2015, the remittitur shall issue on April 23, 2015.

It is so ORDERED.

s/_____, C.J.
Gibbons

Appendix D

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive,

Defendants.

Dated: January 29, 2009, 9:00 a.m.
Filed: February 2, 2009
(filed under seal by order of the Discovery Commissioner dated February 22, 1999)

ORDER DENYING:

(1) FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND

(2) FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59

This matter having come before the Court on January 29, 2009, for hearing the Defendant California Franchise Tax Board's ("FTB") Motion for Judgment as a Matter of Law or Alternatively, and

Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59, Plaintiff having been represented by Mark A. Hutchison, Peter C. Bernhard, Donald J. Kula, and Michael K. Wall and the Franchise Tax Board having been represented by Pat Lundvall, Carla Higginbotham, and Robert L. Eisenberg; the Court having considered the papers submitted by counsel as well as oral arguments at the hearing; and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that the FTB's Motion for Judgment as a Matter of Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 be and the same hereby are denied.

Dated this 2 day of Feb., 2009.

s/Jessie Walsh
DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive,

Defendants.

Filed: May 31, 2000

ORDER

Defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), having come before the Court, the plaintiff being represented by Thomas L. Steffen, Esq., Mark A. Hutchison, Esq., Donald J. Kula, Esq., and Thomas K. Bourke, Esq., and the defendant being represented by Thomas R. Wilson, II, Esq., Thomas Heller, Esq., and George Takenouchi, Esq., the Court having considered all of the papers filed by the parties and argument of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), is denied.

ORDER

IT IS SO ORDERED.

Dated this 31 day of May, 2000.

s/Nancy M. Saitta
DISTRICT COURT JUDGE
NANCY M. SAITTA

Appendix E

U.S. Const. art. IV, §1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. §2680(a)

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

FILED
APR 21 2015
OFFICE OF THE CLERK

No. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petitioner, the Franchise Tax Board of the State of California ("FTB").[1] The Commission urges this Court to grant the FTB's petition for certiorari in order to review the decision of the Nevada Supreme Court, which held that the FTB was liable for fraud and intentional infliction of emotional distress related to the FTB's audit of a Nevada plaintiff, and that the cap on statutory damages under Nevada law, applicable to that state's governmental agencies, did not apply to the FTB. *Franchise Tax Bd. of California v. Hyatt*, 335 P.3d 125 (Nev. 2014).

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding the validity

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. The parties received timely notice of the *amicus*'s intent to file this brief. The petitioner has granted permission to file this brief, and the respondent has filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party.

of the Compact). Today, forty-seven states and the District of Columbia participate in the Commission as compact, sovereignty or associate member states.[2] The Commission comprises the heads of state agencies charged with administering state taxes to which the Compact applies in compact member states.

The purposes of the Multistate Tax Compact (the "Compact") are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Compact, Art. I. The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.*, H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong., 2d. Sess. (1966).

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[2] Compact Members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington. Sovereignty Members: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, and West Virginia. Associate Members: Arizona, California, Connecticut, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

While the Compact was created to foster increased cooperation among the states and to promote uniformity in taxation of multistate businesses, the states have not relinquished their sovereignty in joining the Compact or participating in the activities of the Commission. The states recognize the benefits of cooperating to identify and solve common problems.

The Commission's interest in this case is two-fold. Allowing private parties to sue state tax agencies in the courts of their sister states, challenging or collaterally attacking tax assessment, enforcement, and collection activities, will disrupt well-settled processes used by states to ensure that revenues are properly and timely collected. This will have a chilling effect on interstate cooperation—epitomized by the states' voluntary participation in the Compact and the Commission—and will threaten core sovereign interests.

SUMMARY OF ARGUMENT

When this case was last before the Court, the question presented was "whether Article IV, § 1, of the Constitution requires Nevada to give full faith and credit to California's statute providing its tax agency with immunity from suit." *Franchise Tax Bd. of California v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). The Court held that it did not. *Id.* at 499. In *Hyatt I*, this Court was not asked to reexamine its holding in *Nevada v. Hall*, 440 U.S. 410 (1979), that a state may not assert its sovereign immunity in suits brought by private plaintiffs in the courts of a sister state. *Hyatt*

I, 538 U.S. at 497. The Commission believes, however, that holding must now be reconsidered.

Nevada v. Hall was a personal injury suit brought in California courts against the University of Nevada arising from an automobile accident in California involving an employee of the university. In *Hall*, this Court announced for the first time that a state could not assert sovereign immunity as a defendant in a suit brought by a private plaintiff in the courts of another state. The majority acknowledged that California and Nevada had conflicting sovereign interests—Nevada, to be free from suit without its consent, and California, to assert jurisdiction over matters occurring within its borders. The Court resolved this conflict entirely in favor of the forum state and against Nevada's sovereign immunity interest. Citing *Bank of Augusta v. Earle*, 38 U.S. 519 (1839), the majority noted that when the forum state's interest or policy requires it to restrict the application of comity generally (which would normally counsel dismissal of private suits against sister states), "it has but to declare its will, and the legal presumption is at once at an end." *Hall*, 440 U.S. at 426.

The holding that the forum state need only express its "will" in order to foreclose any defense of sovereign immunity, appears to leave states open to all manner of private suits—even suits that they might never be subject to in their own courts or courts of the federal government. The Commission is confident that states would not allow their own courts to hear collateral attacks on tax determinations in the guise of "fraudulent" assessment claims. Neither would the federal courts' own comity doctrine allow

private suits that might interfere with state tax collection. *Levin v. Commerce Energy*, 560 U.S. 413 (2010). The Commission and its member states have a particular interest in assuring that tax determinations are made according to each state's laws and procedures, which often include limiting jurisdiction to specialized tax tribunals and administrative forums. The fact that states might face private suits challenging their taxing authority in the courts of another state is astonishing.

But in a footnote to the majority opinion in *Hall*, the Court also noted that the personal injury suit there posed "no substantial threat to our constitutional system of cooperative federalism," nor did it present the opportunity to consider whether different state policies might require different analysis or a different result. *Hall*, 440 U.S. at 424 n. 24. This statement has been taken by some as raising the possibility of a different outcome under other circumstances. The dissent in *Hall*, however, was understandably troubled by the implications of the general holding and found the majority's "fragile footnote disclaimer," less than reassuring. *Id.* at 427 (Blackmun, J., dissenting).

This case tests whether the disclaimer suggested by that footnote is not only fragile but truly illusory. As this Court has long recognized, the "highest attribute of sovereignty" is the right to raise revenue, since without it, no other right can be held or enjoyed. *M'Culloch v. State of Maryland et al.*, 17 U.S. 316, 339 (1819). If private suits against state revenue agencies in courts of another jurisdiction do not potentially raise a "substantial threat to our consti-

tutional system of cooperative federalism," then it is hard to imagine anything that will.

The threat posed by this case to the states' long history of interstate tax cooperation may not have been apparent when it was first heard by this Court. This Court allowed this case to proceed to trial based on its understanding that the courts of Nevada would respect California's overwhelming interests in determining its own tax policies. It proved impossible, however, to fairly adjudicate California's liability for "intentional torts" in connection with the decision to audit and assess a taxpayer without first determining if the taxpayer owed the tax which was assessed—a determination that the Commission insists must remain the exclusive province of the California tax tribunals.

While the plaintiff, Hyatt, claimed not to be attempting to contest his California tax liability in the Nevada courts, his suit against the FTB was clearly disruptive to the resolution of that matter. Even more troubling than the prospect of collateral attacks on state tax enforcement, would be the attempt by a private plaintiff to force resolution of some aspect of a taxing state's assessment in a sister-state's forum. While this prospect is obviously obnoxious to cooperative federalism, there appears nothing now that would prevent it, certainly nothing in either *Hall* or *Hyatt I*. This is in contrast with the immunity that states enjoy in federal courts. Even when private plaintiffs seek to vindicate federal rights against violation by states, where there is no question which sovereign's "will" is supreme, those plaintiffs must respect the limits that this Court has

placed on such lawsuits. *See Virginia Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1642-43 (2011)(Kennedy, J., concurring).

After *Hall* and *Hyatt I*, it is clear that the states' core sovereignty interest in collecting tax revenue may be threatened by private lawsuits which could, at the very least, interfere with, disrupt or delay tax enforcement efforts. Moreover, the only protection from this threat is comity, which, under both *Hall* and *Hyatt I*, would still allow the court in the forum state to follow the will expressed by lawmakers in that state rather than the will expressed by the taxing state. The potential for conflict is more than just theoretical. Moreover, that conflict threatens cooperative federalism in an area—tax administration—where such cooperation is essential. Therefore, this Court should revisit *Hall*, and restrict its holding to suits that, unlike this one, do not pose such a threat.

ARGUMENT

I. Certiorari should be granted to consider the impact that lawsuits like this one might have on state tax enforcement, a core element of state sovereignty, and on our system of cooperative federalism.

As the FTB's petition recites, California audited Gilbert Hyatt over twenty years ago to determine whether he had falsely disclaimed his California residency in order to avoid substantial state income taxes. The suit brought by Mr. Hyatt in Nevada courts eventually went before a jury where a judgment against the FTB of almost 500 million dollars was imposed. *See* FTB's Petition for Writ of Certio-

rari, p. 1. While the Nevada Supreme Court has reduced that judgment, it nevertheless affirmed that the FTB was liable for fraud and intentional infliction of emotional distress. *See id.* at pp. 4-12. While such suits have historically been rare, the potential opportunities for them are not.

One of the aspects of our system of federalism is that states are free to adopt different taxes, as their lawmakers and those they represent may choose, and citizens are free to move their residence from one state to another for tax or other reasons. Consequently, questions of residency and the taxes that individuals may owe in particular states, like those at issue in the audit of Mr. Hyatt, are ubiquitous, as are the specific issues that may arise in that context. *See Bicknell v. Jordan*, 321 P.3d 37 (Kan. Ct. App. 2014)(unpublished table opinion)(whether failure to exhaust administrative remedies bars a suit challenging the constitutionality of a tax regulation); *Gaied v. New York State Tax Appeals Trib.*, 6 N.E.3d 1113 (N.Y. Ct. App. 2014)(how a statutory residency rule must be applied); *Severns v. New Mexico Taxation & Revenue Dep't*, No. 31,817, 2013 WL 4516183 (N.M. Ct. App. Apr. 1, 2013) (whether a New Mexico resident changed his domicile to Nevada); *Grede v. Illinois Dep't of Revenue*, 2013 IL App (2d) 120731-U, 2013 WL 1737863 (April 22, 2013); (whether claiming a homestead exemption is an indicium of residency); *Mauer v. Comm'r of Revenue*, 829 N.W.2d 59 (Minn. 2013)(what facts establish tax residency for an individual who travels extensively).

Also, in our system of federalism, states must permit and may not discriminate against interstate com-

merce, nor may they benefit in-state economic interests by burdening out-of-state competitors. *McBurney v. Young*, 133 S.Ct. 1709, 1719 (2013). States may, however, subject interstate commerce to its fair share of state taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). But, of course, this also means that states will necessarily have, as taxpayers doing business in the state, individuals and businesses that may be domiciled elsewhere. So in addition to taxes imposed on individuals based on residency, states must continually respond to challenges brought by out-of-state businesses conducting activities in the state as to the liability of those businesses for income, sales and other types of taxes. *See Ex parte Alabama Dep't of Revenue*, 69 So.3d 144 (Ala. 2010)(whether income from sale of a portion of a business should be apportioned among the states where the taxpayer did business or allocated to the state where the business assets were located); *Harris Corp. v. Arizona Dep't of Revenue*, 312 P.3d 1143 (Ariz. Ct. App. 2013)(same); *Centurytel, Inc. v. Oregon Dep't of Revenue*, 297 P.3d 1264 (Or. 2013)(same).

Regardless of the tax system or the diligence and effectiveness of tax administrators, there will always be a level of noncompliance. When such noncompliant taxpayers are outside a state's borders, this obviously complicates enforcement. State tax administrators, therefore, rely on the cooperation of their sister states to ensure that taxes can be fairly imposed and collected. This cooperation comes in many forms, including assistance in the enforcement of subpoenas to obtain the records, without which tax liability could not be determined, and the ability to

domesticate and enforce judgments as to tax liabilities. *See Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935)(holding states may not deny full faith and credit to a judgment for taxes); the Uniform Depositions and Discovery Act;[3] and also the Uniform Enforcement of Foreign Judgments Act.[4] States also cooperate in other ways including sharing of information,[5] and agreements to offset tax liabilities.[6] In the context of state tax enforcement, cooperative federalism is not just an ideal, it is imperative. If a taxing state must worry that its sister states' courts might assert the right to adjudicate its tax-related or enforcement matters, this will inevitably create conflicts that may also impact state cooperation.

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[3] Available on the Uniform Law Commission website at: http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf

[4] Available on the Uniform Law Commission website at: http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf.

[5] *See* the Federation of Tax Administrators' Uniform Exchange of Information Agreement, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Events/Annual_Conference/1993FTAUnifromExchangeofInformationAgreement.pdf; and Memorandum of Agreement to combat abusive tax shelters, signed by the states and the Internal Revenue Service and reported in California FTB Press Release, March 4, 2004, https://www.ftb.ca.gov/aboutFTB/press/archive/2004/04_32.shtml

[6] *See, e.g.*, Del. Code Ann.30 § 558(b)(1)-(2), Ky. Rev. Stat. Ann. § 131.230, Tex. Tax Code Ann. § 151.615, Ark. Code Ann. § 26-18-707, N.C. Gen. Stat. Ann. § 105-268.

In addition to substantive tax laws, including whether a state chooses to impose a certain tax or not, special procedural rules for raising a challenge to the imposition or collection of taxes are common and ensure state revenue streams are protected, delays are avoided, and proper regulatory expertise is brought to bear on difficult questions. *Perez v. Ledesma*, 401 U.S. 82, 127 n. 17 (1971)(Brennan, J., concurring in part and dissenting in part)("adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules"). This Court has also long recognized there should be limits on the role of the judiciary in entertaining challenges to the tax and policy decisions of lawmakers. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006)(explaining that granting taxpayers standing to press a challenge to the myriad of tax and fiscal decisions states might make would improperly interpose federal courts as "monitors of the wisdom and soundness" of state fiscal administration).

This Court and others have also recognized that the ability to sue a sovereign for redress of a tax related claim requires explicit waiver of sovereign immunity. *U.S. v. Williams*, 514 U.S. 527, 531 (1995)(the task of the Court is to discern the "unequivocally expressed" intent of Congress, construing ambiguities in favor of immunity); *Patterson v. Gladwin Corp. et al.*, 835 So.2d 137 (Ala. 2002)(dismissing a class action suit where immunity for such suits had not been waived); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002)(holding that a suit for declaratory judgment could not be brought in a tax

case). Courts have further recognized that if a state provides for a statutory administrative remedy, that remedy must be exhausted before proceeding to state courts, although the nature of those remedies and extent to which exhaustion is required varies by state. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989)(waiver of sovereign immunity from suit was conditioned upon exhaustion of remedies) and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006)(no class action may be brought where any member of the putative class has not exhausted administrative remedies).

A particular state's substantive and procedural tax rules would normally apply to all taxpayers, whether based inside or outside the state. For example, the state revenue agency may audit an out-of-state business and propose an assessment. The state's rules might then provide a period of time for the taxpayer to challenge the proposed assessment administratively, before it becomes a final, collectible liability. The state would then provide a process for appealing an adverse administrative decision to the state's courts. All courts in the jurisdiction would, of course, be bound constitutionally and by the doctrine of separation of powers to follow applicable substantive and procedural law in that state. Administrative rulings of the revenue agency would typically be given deference by the state's courts and might be subject to an abuse-of-discretion, or similar standard of review. If the state ultimately prevails, the assessment would become a judgment, enforceable within the state, or subject to domestication and enforcement in the taxpayer's home state under the Full Faith and

Credit Clause. *M.E. White Co.*, 296 U.S. at 278. The decision of an appellate court in the matter would also typically be treated as binding precedent under the doctrine of stare decisis (and federal courts would be bound to follow that interpretation of the state's law, as well) in any case with a similar issue. The same and other related processes for similar kinds of tax disputes (claims for refunds, claims for credits, etc.), with all their attendant governing rules would also apply to instate and out-of-state taxpayers alike.

In short, the rules of each state for contesting and enforcement of taxes create a rational and well-ordered process on which the settled expectations of both tax enforcement personnel and taxpayers rely. But the combination of this Court's decisions in *Hall* and *Hyatt I* threaten disruption and uncertainty. Not only does this threat come from the possible use of a lawsuit brought in a sister state to delay or otherwise interfere with the enforcement of taxes by a taxing state, but it also comes from the possibility that the tax dispute, or some element of it, might be adjudicated outside of the taxing state, and in accordance with other procedural, or perhaps even substantive, rules.

Again, while such suits are rare in state courts, there have certainly been many attempts over the years to circumvent state court jurisdiction and bring state tax related suits in federal court, despite the jurisdictional bar imposed under 28 U.S.C. § 1341 (the Tax Injunction Act) as well as the doctrine of comity. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); and *Franchise Tax Bd. of California*

v. Alcan Aluminium Ltd., 493 U.S. 331 (1990); *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

Just as states are not compelled to adopt the same substantive rules, they are not compelled to use the same procedure or to afford the same protections to taxpayers. Under *Hall* and *Hyatt I*, there is little certainty as to how potential conflicts between taxing state and forum state rules would be resolved. Neither does there appear to be any reason to think that such conflicts will not occur.

First, if the state audits an out-of-state taxpayer in that taxpayer's home state, the courts of that state would have personal jurisdiction over the taxing state for any case involving the audit itself, and likely the assessment as well. *See Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005)(holding that a New York had personal jurisdiction over states for enacting legislation to implement the tobacco Master Settlement Agreement negotiated in New York by states' attorneys general) . Under *Hall*, the taxing state would not be entitled to assert sovereign immunity as a defense to the lawsuit in the taxpayer's home state. The taxing state might also not be entitled to assert that the taxpayer must exhaust administrative remedies in the taxing state before proceeding with the lawsuit.

Under *Hyatt I*, the taxing state would also have no guarantee that the forum state's court would apply all of the substantive or procedural law of the taxing state under the Full Faith and Credit Clause. *Hyatt I* at 494. Unlike the courts in the taxing state, which

are bound to follow the legislative enactments in those states, the courts in the taxpayer's home state may substitute that state's own law or procedures under conflict of law rules. See *Sam v. Sam*, 134 P.3d 761 (N.M. 2006)(holding that the New Mexico rather than the Arizona statute of limitations applied in a case where an Arizona governmental entity was the defendant).

It is true that the taxing state could still institute, in that state, administrative proceedings against the taxpayer, requiring that the taxpayer pursue or waive administrative remedies, leading to a final assessment. The taxpayer might then have the right to appeal that final assessment to the courts in the taxing state. Some states do not require the payment of the assessment before the filing of an appeal, and those states would not be able to collect the tax until the appeal was resolved.

But the outcome of this dual track litigation would be uncertain and would depend on the timing of the judgments in each state and whether either party might assert *res judicata* or collateral estoppel, or otherwise seek to enforce the judgment under the Full Faith and Credit Clause. The precedential effect of a decision from a court in the taxpayer's home state would also be uncertain. It would presumably have force in similar cases in that state, but not in the taxing state's courts, leading to the possibility that taxpayers might be treated differently based on where they are located.

It may well be that in many cases state courts can be depended upon to exercise discretion under the doc-

trine of comity to dismiss cases that involve the adjudication of matters relating to other states' tax laws. Or, even if they do not, those courts may well limit any adjudication to issues not central to the tax determination, or may properly apply the taxing state's law and procedural rules to any tax issues. This would arguably strike a permissible balance under comity, as *Hall* expressed it, since the forum state's only interest would be that its courts have jurisdiction over the matter. But it is not difficult to imagine cases where the forum state would have a separate interest in and connection to the issue.

For example, states typically tax all of the income of their residents and then grant credits for taxes those residents might be required to pay to other states on the same income. This creates a potential conflict of interest between states. When a state asserts the right to tax income earned within its borders by a nonresident, the nonresident's home-state arguably has an interest in the resolution of that issue. If the courts of the nonresident's home-state provide procedural or other benefits to a suit challenging the taxing state's assessment, it is not clear what, including the requirements of comity as expressed in *Hall*, would prevent the nonresident taxpayer from choosing that more favorable forum.

Again, while this scenario may be less likely to occur than suits seeking to delay or interfere with a state's process for assessing or enforcing its taxes, both pose risks that are real and can only be addressed by reexamining the effects of *Hall*.

II. This petition presents the Court with an opportunity to "rebalance" *Hall*, to prevent the threat it poses to core state sovereignty and to cooperative federalism.

In *Hyatt I*, this Court applied its holding in *Hall* to conclude that Nevada's courts could hear a challenge to California's enforcement of taxes. This Court concluded that the Nevada courts had, at least to that point, shown the proper "sensitivity" to California's sovereign interests and that there was no basis to distinguish between the tort claims in *Hall* and the "intentional tort" allegations in the present dispute. *Hyatt I* at 499. In allowing Mr. Hyatt's case against California to proceed, this Court disregarded warnings of the dissenting justices in *Hall* that not recognizing state sovereign immunity from suit, or even subordinating that immunity to the sovereign interests of the forum state, would effectively remove all limits on the ability of private litigants to sue states. Saying: "The Court's expansive logic and broad holding—that so far as the Constitution is concerned, State A can be sued in State B on the same terms any other litigant can be sued—will place severe strains on our system of cooperative federalism," the dissent urged that a limit be found that would avoid this threat. *Hall*, 440 U.S. at 429 (Blackmun, J., dissenting).

The jury is now in, both literally and figuratively, on the possible effects of the Court's holdings in *Hall* and *Hyatt I*, that no harm to the concept of "cooperative federalism" would follow from stripping states of their inherent sovereign immunity from suits in another state. A Nevada jury has awarded Hyatt $490

million in actual and punitive damages, to be paid by the citizens of a neighboring state, based on claims of "fraudulent" auditing and assessment and "intentional infliction of emotional distress" arising out of California's audit of its one-time resident.

CONCLUSION

This case amply demonstrates why immunity from suit is a vital component of any sovereign's ability to govern and to exercise essential government functions, like the collecting of taxes. Allowing the Nevada Supreme Court's decision to stand could be construed as giving this Court's imprimatur of approval to further judicial interventions in the essential activities of sister states in the name of protecting that forum state's interests. Accordingly, the Commission urges this Court to grant the FTB's petition for certiorari.

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IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members who are facing legal challenges.

IMLA is committed to protecting its members' discretion under state and federal law to make policy decisions without the threat and cost of prolonged litigation, which would significantly—if not prohibitively—impede both functionality and ingenuity. The decision below, however, adopts an unduly narrow interpretation of the discretionary function immunity that would leave the multitude of policymaking decisions of municipal actors open to suit as long as the complainant makes any claim that includes an element of subjective intent. This approach is not only flatly inconsistent with

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[1] No counsel for any party to these proceedings authored this brief in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

precedent from the majority of courts across the Nation but also would expose municipalities to years upon years of ceaseless litigation—as occurred in this case—at costs of potentially billions of dollars. IMLA has a strong interest in ensuring that local governments and their officials are protected from suit for decisions made in their official capacity based on the legitimate budgetary, administrative, and enforcement concerns that animate local bodies.

INTRODUCTION AND SUMMARY

In a seventeen-year-old suit alleging tortious conduct by the California Franchise Tax Board, the Nevada Supreme Court held that a governmental body may be sued by any aggrieved individual and subject to civil common law tort liability for any decision the body makes in its official capacity so long the individual merely alleges that the decision was made with improper "intent" or in "bad faith." This decision directly contradicts a host of federal appellate cases recognizing that, under the so-called "discretionary function exception," 28 U.S.C. § 2680(a), governmental bodies and their officials are entitled to immunity from suit for actions taken in their official capacities, regardless of subjective intent.

The discretionary function immunity, grounded on the principle of separation of powers, shields discretionary judgments made by government actors from civil tort liability. Removing an entire category of torts—those framed as "intentional" or involving "bad faith"—from its protection provides incentive for litigants to characterize claims in these terms merely to avoid a valid immunity defense. This result would defeat the very purpose of the immunity, which is

recognized by both federal statute and laws in a majority of states.

The decision below especially threatens the functionality of municipal governments, which provide a broad range of services and interact with individuals on a frequent and personal level. Both the nature and scope of local government responsibilities generate substantial bases for tort claims. Moreover, the denial of immunity for all intentional torts results in particularly harsh consequences due to the protracted litigation and extensive discovery required to probe subjective intent. For these reasons, both the monetary and nonmonetary costs (*e.g.*, chilling of discretionary action, distraction from official duties, and deterrence of entry into public service) are amplified—and unacceptable for governments whose functionality is required to serve the public interest.

ARGUMENT

I. NARROWING THE SCOPE OF THE DISCRETIONARY FUNCTION IMMUNITY WILL IMPEDE THE FUNCTIONALITY OF LOCAL GOVERNMENTS AND HARM THE PUBLIC INTEREST.

The decision below puts at risk thousands of discretionary municipal decisions that span an extremely broad scope of activities. Given the close relationship between local government responsibilities and the community, many of these municipal activities can give rise to tort claims. A narrow interpretation of the discretionary function immunity of the type adopted by the court below threatens the policymaking capacity and functionality of these entities as well as the critical services they provide.

1. Municipal decision-making touches upon countless aspects of every citizen's life. To name just a few, municipalities and local governments regulate and supervise sanitation, water systems, street construction and maintenance, fire departments, ambulances, health departments, public transportation, utilities (*e.g.*, gas, electricity, cable television), public schools, law enforcement, and housing inspections. These services encompass everything from transporting books between public libraries to maintaining local parks. Municipalities tackle large-scale decisions like whether to fund a low-income housing project as well as the detailed minutiae of how many part-time school crossing guards to employ.

Yet, municipal activities cover much more than this abbreviated list of public services. Structuring and administering a tax system to, among other things, support these services is a significant responsibility. Local governments also manage urban planning and zoning, the issuance of licenses and permits, and even emergency responses to floods and forest fires.

The nature and scope of municipal activities make these entities particularly vulnerable to intentional tort claims. As one example, these governments are in charge of many local safety measures that involve decisions that could easily give rise to a tort claim, such as an injury resulting from an insufficient earthquake response or the absence of a stop sign. A sample of intentional tort claims—assault, battery, conversion, false imprisonment, trespass to land, intentional infliction of emotional distress, fraud, and invasion of privacy—when viewed in light of the multitude of municipal responsibilities, demonstrates how easily an individual could plead such a claim. Local government activities touch upon the lives of all

community members to some extent, often through both frequent and personal interactions, and could easily generate hundreds if not thousands of tort suits.

In addition, municipal decisionmaking is not always suited for thorough analysis and debate. Judgment calls may sometimes need to be made quickly, such as a response to an unanticipated crisis. Unfortunately, the potential for injury and the consequent risk of tort liability may be much higher—understandably so—for these types of decisions.

Any expansion of tort liability will significantly impede the functionality, flexibility, and ingenuity of local governments. Given the scope and nature of municipal responsibilities, these consequences are of great public concern. Local governments require exactly these qualities to provide effective services, whether it is maintaining roads or providing shelter to the homeless in inclement weather.

2. The danger of the decision below to the functionality of local governments has several dimensions: (a) increase in lawsuits filed; (b) protracted and costly litigation; (c) distraction of officials from government responsibilities; (d) limits on discretion to avoid liability; (e) deterrence of entry into public service; and (f) judicially-created administrative standstill through direct or indirect means (*i.e.*, injunctive or monetary relief, respectively).

First, the exception for subjective intent in the decision below invites gamesmanship in the characterization of claims to bypass the traditional protection for discretionary functions. Given the large-scale and often personal relationships between

municipal governments and community members, it would be relatively easy to frame an injury as a result of, for example, the intentional infliction of emotional distress or invasion of privacy. Litigants have greater incentive to bring these claims, regardless of the merits, because more pressure is brought to bear on government when the immunity is not available.

Second, while all discretionary function challenges impose some monetary costs on government, claims that rely on a subjective element are uniquely costly given the nature and amount of discovery required. As the Court noted in *Harlow v. Fitzgerald*, "questions of subjective intent so rarely can be decided by summary judgment" and "also frame a background in which there often is no clear end to the relevant evidence." 457 U.S. 800, 816-17 (1982).[2] The case at hand provides ample support for the Court's conclusions: litigation began more than seventeen years ago in January 1998 and includes several rounds of appeal to the Nevada Supreme Court and one appeal to this Court.

The rationale for the discretionary function immunity is apparent in exactly these situations that call up questions of subjective intent. "There are special costs to 'subjective' inquiries of this kind" because "the judgments surrounding discretionary

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[2] In the context of qualified immunity, the Court in *Harlow* concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. The Court dispensed with the subjective element of the good faith defense and held instead that government officials' discretionary functions are shielded from civil liability under an objective test: as long as the "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." *Harlow*, 457 U.S. at 816. Attempting to disentangle these "experiences, values, and emotions" from other decisionmaking criteria, some of which may also be subjective, would prove a very difficult, if not impossible, task—and at least a lengthy one.[3] Meanwhile, for situations where the challenged decision was made not by a single actor but by a government entity comprised of numerous individuals, these challenges will be multiplied by a large factor.

Third, lawsuits that require a showing of subjective intent impose weighty nonmonetary costs in the form of distraction from official duties, the chilling of discretionary action, and deterrence of entry into public service. *Harlow*, 457 U.S. at 816-17; *see also Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997) (purpose of discretionary function immunity is "protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.") (internal quotation marks omitted). Protracted litigation and extraordinary discovery costs will force local governments to divert significant resources and pull personnel from other duties to meet the

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[3] An order denying a claim of discretionary function immunity, unlike qualified immunity, has not been held to constitute a "final decision" subject to interlocutory appeal under 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Therefore, the government could not head off litigation at an earlier stage unless a particular exception otherwise applied. *See* 28 U.S.C. § 1292.

associated demands, deter individuals from entering public service, or encourage them to leave due to fear of or frustration with these processes.

In the alternative—or, worse, in addition—local governments will dramatically constrain officials' discretion in order to limit liability. Tying the hands of local government in this way would adversely affect entire communities that require quick or creative action to address unanticipated or novel local issues. In a society that wants the best and brightest to join its ranks, and wishes its state and local governments to function flexibly and innovatively as laboratories of democracy, any limits on discretionary action must be narrowly tailored, not categorical.

Furthermore, discovery in these suits is not just different in degree but in kind; it results in particularly harsh chilling effects due to the "broad-ranging discovery and the deposing of numerous persons . . . [that] can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. To establish subjective intent, the parties may question colleagues, close friends, and family members to probe the mental state of the government actor. While the humiliation or embarrassment of the individual official may not warrant consideration, the chilling of his or her actions certainly does. *See Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) ("The concept of immunity assumes [that officials may err] and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984). This type of discovery deters entry to, and discretionary action in, government service—in addition to its prohibitive impact on functionality due to distraction from official duties.

Finally, the concrete relief granted in such cases would restrict officials' discretion and thus local governments' functionality. Monetary relief, particularly punitive damages if available for intentional government torts,[4] diverts resources and constrains action both directly (*i.e.*, insufficient funding) and indirectly (*i.e.*, deterrence). Injunctive relief would directly limit government action and could have especially far-reaching effects depending on its scope and duration.

The total discard of immunity for subjective intent tort claims imposes costs that are much too high. The extensive discovery, ease and threat of litigation, and potentially wide-ranging judicial relief will deter individuals from choosing to serve in government and constrain those that do. Even if particular individuals may derive some remedial benefit in the event of a victory, the government—and, perhaps more importantly, the public—can ill afford these costs.

II. THE DECISION BELOW CONTRADICTS THE VIEW OF A MAJORITY OF CIRCUITS THAT SUBJECTIVE INTENT IS IRRELEVANT TO THE DISCRETIONARY FUNCTION IMMUNITY INQUIRY.

The decision of the Nevada Supreme Court departs from this Court's precedent as well as decisions from the majority of other circuits recognizing that subjective intent is irrelevant to discretionary function immunity. Although the Second Circuit has previously held otherwise, its decisions—like the decision below—rest on a fundamental

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[4] In this case the jury awarded respondent $250 million in punitive damages, although the Nevada Supreme Court reversed this award on principles of comity.

misunderstanding of the basis of the discretionary function exception.

1. This Court has repeatedly said that the discretionary function exception is intended "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). The immunity applies "whether or not the discretion involved be abused" and is grounded "on a concern for separation of powers." 28 U.S.C. § 2680(a); *Owen v. City of Independence*, 445 U.S. 622, 648 (1980). It covers government conduct that (1) "involves an element of judgment or choice" and (2) is "of the kind that the discretionary function exception was designed to shield," meaning "governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37; *see also United States v. Gaubert*, 499 U.S. 315, 325 (1991). The immunity is broadly construed: it is not limited to policymaking and planning decisions but can shield conduct at the implementation stage as long as discretionary judgment is exercised. *Gaubert*, 499 U.S. at 325. The Court has also noted that "the focus of the inquiry is not on the agent's subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.*

The majority of circuit courts have recognized, in light of this Court's precedent, that subjective intent is not relevant in the discretionary function analysis. Four circuit courts that have directly addressed this question have concluded, in line with *Gaubert*, that subjective intent is immaterial in assessing whether the discretionary function exception applies.

Reynolds v. United States, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1137 (10th Cir. 1999); *Irving v. United States*, 162 F.3d 154, 167 (1st Cir. 1998) (en banc); *Fisher Bros. Sales v. United States*, 46 F.3d 279, 286 (3d Cir. 1995) (en banc). In addition to these, decisions in the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits agree that the immunity inquiry under *Gaubert* looks only at the objective nature of the conduct. Pet. for Cert. 17 n.4. The Fourth, Ninth, and D.C. Circuits have also rejected the argument that intentional torts are categorically exempt from the discretionary function immunity. *Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983).

2. But, the Second Circuit has taken a contrary position and held that the immunity does not apply if the injury was a result of carelessness or laziness, as these do not constitute policy-based judgments. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (per curiam); *Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000). Adopting this reasoning, the Seventh Circuit has also concluded that this "type of carelessness would not be covered by the discretionary function exception." *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (reversing order of dismissal of particular claims because further factual development was necessary to determine if discretionary function exception applied); *see also Keller v. United States*, 771 F.3d 1021, 1025-26 (7th Cir. 2014) (seeing no evidence in the record to contradict claims of prison guards' laziness or inattentiveness and reversing grant of summary judgment on basis of discretionary

function exception). Although neither court went so far as to find that all bad-faith or intentional acts are exempt from the discretionary function immunity,[5] their decisions do invite inquiry into a government actor's mental state, which often requires further factual development to determine if the immunity applies. *See, e.g.*, *Keller*, 771 F.3d at 1025-26 (reversing grant of summary judgment); *Triestman*, 470 F.3d at 476 (reversing order of dismissal); *Palay*, 349 F.3d at 432 (reversing order of dismissal); *Coulthurst*, 214 F.3d at 111 (reversing order of dismissal).

These decisions have revealed the subjective intent issue as an unsettled question and provided precedent that has already generated and will generate more contrary caselaw from other courts. While the Second Circuit decisions could be read more narrowly to only except claims of laziness or carelessness from the discretionary function immunity,[6] these opinions have opened the door to questions regarding the mental state of government actors and given rise to much broader limitations on the immunity. The decision below, holding that all intentional or bad-faith tort claims are categorically

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[5] In fact, in 2008, after *Palay* but before *Keller*, the Seventh Circuit expressly stated in *Reynolds* that allegations of "malicious and bad faith conduct" do not defeat a discretionary function immunity defense because "subjective intent is irrelevant to [the] [immunity] analysis." 549 F.3d at 1112.

[6] Both Second Circuit cases were brought by *pro se* litigants, and the court acknowledged its "policy of liberally construing *pro se* submissions" as part of its "obligation . . . to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Triestman*, 470 F.3d at 475; *see also id.* (court read a negligent guard theory into the *pro se* complaint in *Coulthurst*).

excluded from the immunity, is merely one example of a very expansive reading based on these decisions. Another court could find that the immunity does not apply to tort claims alleging reckless or consciously indifferent conduct, as not "of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. But, these readings miss the point: the immunity applies not to a particular action taken but to all general conduct of a "nature" that is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325; *see also* 28 U.S.C. § 2680(a) (immunity applies "whether or not the discretion involved be abused"). Mental state is irrelevant; the purpose of the immunity derives from the need to protect the functionality of governments, even if that sometimes means relief is unavailable for an individual who suffers an injury.

The danger of incorrect and overbroad interpretations cannot be overlooked in light of the scope of the federal statute as well as the number of states—more than half—that recognize a discretionary function exception,[7] many with language identical to that in 28 U.S.C. § 2680(a).

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[7] *See, e.g.*, Alaska Stat. § 09.50.250; Ariz. Rev. Stat. Ann. § 12-820.01(B); Cal. Gov't Code § 820.2; Del. Code Ann. tit. 10, §§ 4001, 4011; Ga. Code Ann. § 50-21-24(2); Haw. Rev. Stat. § 662-15(1); Idaho Code Ann. § 6-904(1); Ind. Code § 34-13-3-3(7); Iowa Code § 669.14(1); Kan. Stat. Ann. § 75-6104(e); Me. Rev. Stat. tit. 14, § 8104-B(3); Mass. Gen. Laws ch. 258, § 10(b); Minn. Stat. Ann. § 3.736(3)(b); Miss. Code Ann. § 11-46-9(1)(d); Neb. Rev. Stat. § 81-8,219(1); Nev. Rev. Stat. § 41.032(2); N.H. Rev. Stat. Ann. § 541-B:19(I)(c); N.J. Stat. Ann. § 59:2-3; N.D. Cent. Code § 32-12.2-02(3)(b); Okla. Stat. tit. 51, § 155(5); Or. Rev. Stat. § 30.265(6)(c); 42 Pa. Cons. Stat. Ann. § 8524(3); S.C. Code Ann. § 15-78-60(5); Tex. Civ. Prac. & Rem. Code Ann. § 101.056; Utah Code Ann. § 63G-7-201(4)(a); Vt. Stat. Ann. tit. 12, § 5601(e)(1).

Without further clarification from the Court, the discretionary function immunity is at risk of sweeping limitations which will exacerbate the current circuit split and severely restrict the discretion exercised by federal, state, and municipal governments.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of certiorari, the petition should be granted and the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 39 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that the States are not immune from suit in the courts of other States, should be overruled because it conflicts with the historical understanding of sovereign immunity, the structure of the Constitution, and this Court's more recent decisions.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming—have a significant interest in the protection of the full scope of sovereign immunity that they enjoy under the Constitution, including immunity from suits in other States. Sovereign immunity is an "integral component of that 'residuary and inviolable sovereignty' retained by the States." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (quoting The Federalist No. 39) (internal citations omitted). It protects the States from "judgments that must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), which would otherwise undermine a State's ability to make policy decisions by sapping scarce resources that could be allocated in other ways, *Alden v. Maine*, 527 U.S. 706, 750–51

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel for all parties of its intent to file an *amicus* brief in support of Petitioner.

(1999). Sovereign immunity also prevents the subjection of a State to "the indignity of . . . the coercive process of judicial tribunals." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

For over 35 years, the States have been subject to suits in the courts of other States under this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), which is an outlier among this Court's sovereign immunity jurisprudence. As the State of West Virginia and 33 other States explained in an *amicus* brief filed in support of another petition currently pending before this Court that also seeks to overrule *Hall*, *amici* have a strong interest as sovereign States in any case that presents an opportunity for this Court to overturn *Hall* and vindicate the full scope of *amici*'s constitutional immunity from suit. Because the legal issues are identical, this brief presents arguments similar to those in the earlier-filed *amicus* brief and differs primarily in its explanation of how the facts in this case uniquely illustrate the problems with *Hall*.

REASONS FOR GRANTING THE PETITION

The time has come for this Court to revisit its decision in *Nevada v. Hall*, which held that States are not immune from suits in the courts of other States. The Court in *Hall* avoided both the structure and the history of the Constitution to reach its holding. 440 U.S. 410, 418–27 (1979). But this Court's decisions since *Hall* have established that

immunity is implicit in the structure of the Constitution and that an examination of the history of sovereign immunity is a necessary part of any sovereign immunity analysis. *Alden v. Maine*, 527 U.S. 706, 727–28 (1999). Those cases make *Hall* an aberration that cannot be justified under this Court's approach to questions of sovereign immunity.

In *Hall*, the Court expressly rejected the possibility that the immunity of States might be implicit in the structure of the Constitution. 440 U.S. at 424–27. The Court reasoned that, because neither the text of Article III nor the Eleventh Amendment provided the States immunity from suit in the courts of other States, such immunity was not an explicit part of the Constitution. *Id.* at 420. And it declined to "infer[]" immunity "from the structure of our Constitution and nothing else." *Id.* at 426.

Hall also specifically disregarded evidence of the understanding of the immunity of States at the time of the ratification of the Constitution and the Eleventh Amendment. *Id.* at 418–19. The Court acknowledged that sovereign immunity was "[u]nquestionably . . . a matter of importance in the early days of independence." *Id.* at 418. But because "[t]he debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III," the Court concluded that "the question whether one State might be subject to suit in the Courts of another State was apparently not a matter of concern when the new

Constitution was being drafted and ratified." *Id.* at 418–19. The Court similarly dismissed the understanding of immunity evidenced by the enactment of the Eleventh Amendment because "all of the relevant debate[] concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts." *Id.* at 420–21.

The Court in *Hall* instead relied on the decision of this Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), to conclude that each State had discretion to choose not to extend immunity to other States. 440 U.S. at 416–18. *Hall* read *The Schooner Exchange* to stand for the proposition that sovereign nations determine for themselves whether to extend immunity in their courts to other sovereign nations. *Ibid.* Reasoning that States stand in a relationship to one another similar to the relationship between nations, the Court thus held that only principles of comity prevented one State from being sued in the courts of another. *Id.* at 417–18, 421. But the Court admitted that this rule would not have applied if it had found "a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418.

Hall was wrong when it was decided and is wrong today. As this Court has since made clear, the

structure of the Constitution implies that the States are immune from suit in the courts of other States, and the history of sovereign immunity supports this conclusion. Yet as this case aptly demonstrates, States remain subject, at the discretion of courts in other States, to suits that undermine their ability to govern according to their own political processes. This case, in which a California state agency has been sued in a Nevada court for the enforcement of the State of California's tax policy, illustrates the need for this Court to correct the erroneous reasoning in *Hall*.

This Court should grant certiorari and overrule *Hall*.[2]

I. *HALL* CONFLICTS WITH THIS COURT'S RELIANCE ON THE STRUCTURE OF THE CONSTITUTION IN SOVEREIGN IMMUNITY CASES.

A. This Court's decisions since *Hall* have rejected that case's reasoning that the scope of the States' sovereign immunity is limited to what the explicit guarantees of the Constitution provide. The sovereign immunity of the States is based not on a particular textual grant but on "the structure of the

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[2] *Hall* also addressed whether the Full Faith and Credit Clause of the Constitution required California to respect Nevada's limited waiver of immunity. 440 U.S. at 421–24. The Court concluded that it did not but that a State could be required to give the policy of another State full faith and credit if it implicated our system of cooperative federalism. *Id.* at 424 n.24. That issue is not addressed in this brief.

original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999); see also, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997) (explaining that a "broader concept of immunity" is "implicit in the Constitution"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (confirming that the Eleventh Amendment is important for "the presupposition . . . which it confirms" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))). This constitutional immunity is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713; see also *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) ("The Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework.").

These decisions find their primary support in the reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that a private citizen could sue a State in federal court. *Id.* at 450–53 (Blair, J.); *id.* at 468 (Cushing, J.); *id.* at 461–66 (Wilson, J.); *id.* at 478–79 (Jay, C.J.). The decision "fell upon the country with a profound shock." *Alden*, 527 U.S. at 720 (quoting 1 C. Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)). Both Houses of Congress approved the Eleventh Amendment, which provides that the

power of the federal courts will not be construed to extend to a suit brought by an individual against a State, with almost unanimous votes after a single day of discussions. *Id.* at 721. The States then ratified the Amendment quickly. *Fed. Mar. Comm'n*, 535 U.S. at 752. Critically, the text of the Eleventh Amendment did not "codify[] the traditional understanding of sovereign immunity" but instead "address[ed] the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *Alden*, 527 U.S. at 723. Nevertheless, this Court has found that the "natural inference" from the circumstances surrounding the Amendment's adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Id.* at 724. On that basis, this Court has concluded that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.* at 713. Instead, the Eleventh Amendment points to "the broader concept of immunity, implicit in the Constitution." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267–68.

B. Under this now "settled doctrinal understanding" that the structure of the Constitution is the source of the States' sovereign immunity, it is readily apparent that *Hall* cannot continue to stand. *Alden*, 527 U.S. at 728. The founders included several provisions in the

Constitution that expressly provide a neutral federal forum for certain interstate disputes. For example, this Court has original jurisdiction over suits between two or more States. U.S. Const. art. III, § 2, cl. 2. Similarly, the federal courts were given jurisdiction over suits "between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. These provisions evince a design by the founders to ensure the availability of a neutral federal forum for cases in which a State is properly a party. Cf. Amy Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 259–263. And implicit in that design is that such disputes would or could not be heard in state courts for some reason, including that States had the option to assert immunity in their own courts or the courts of other States.

Indeed, members of the founding generation expressly noted that these constitutional provisions assumed the immunity of States in the courts of other States. In his 1790 Report on the Judiciary to the House of Representatives, the first Attorney General of the United States, Edmund Randolph, explained that the Constitution confirmed that the States would remain immune from suits in the courts of others States "by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT 130 (Maeva Marcus, ed., 1992).

The sovereign immunity of States in their sister States is also implicit in the ratification of the Eleventh Amendment. That amendment removes actions commenced by a citizen of another State from the jurisdiction of the federal courts. U.S. Const. amend. XI. If the ratifiers of the Eleventh Amendment had thought that the Constitution permitted a State to be sued in the courts of another State, the States would have "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting).

Hall turns the constitutional structure on its head. States are generally immune from suits in federal court, U.S. Const. amend. XI, and are immune from suits in their own courts, *Alden*, 527 U.S. at 754. But *Hall* makes States susceptible to suit in the potentially biased courts of other States subject only to the other States' decisions to extend comity. *Hall*, 440 U.S. at 418, 421. This Court should grant certiorari and vindicate our Constitution's structure.

II. *HALL* CONFLICTS WITH THIS COURT'S RELIANCE ON THE HISTORY OF SOVEREIGN IMMUNITY.

A. This Court's decisions since *Hall* have established, too, that *Hall* was wrong to reject "history and experience, and the established order of things," in determining whether States are immune from suit in the courts of other States. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v.*

Louisiana, 134 U.S. 1, 14 (1890)). The immunity retained by the States is the immunity that the States "enjoyed before the ratification of the Constitution . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. An examination of the historical understanding of sovereign immunity is thus critical to defining the scope of the States' immunity. That historical evidence includes "the ratification debates and the events leading to the adoption of the Eleventh Amendment," which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726.

Importantly, this Court has relied on ratification debates and other historical evidence to determine the scope of the States' immunity in a number of contexts even though the ratification debates addressed only certain specific questions about the States' sovereign immunity. *Id.* at 716–17. For instance, although the ratification debates focused on whether a State could be sued by *an individual*, this Court has relied on evidence of the understanding of immunity at the time of ratification to conclude that a State is immune from suits by federal corporations, *Smith v. Reeves*, 178 U.S. 436, 447–49 (1900), foreign nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–32 (1934), and Indian tribes, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779–82 (1991). And although the ratification debates centered on the question of the States' immunity from suit *in federal courts*, this Court has relied on

evidence of the understanding of immunity at the time of ratification to conclude that States are immune from suits in their own state courts, *Alden*, 527 U.S. at 741–43, and in federal administrative agencies, *Fed. Mar. Comm'n*, 535 U.S. at 754–61. *Hall*'s refusal to consider evidence of the understanding of sovereign immunity at the founding, as well as its dismissal of the ratification debates because those debates focused on questions of federal jurisdiction, cannot be reconciled with these decisions. 440 U.S. at 418–20.

B. Furthermore, a review of the historical evidence reveals that *Hall* should have come out the other way. Immunity from suit was an essential attribute of the sovereignty of the States at the time of the adoption of the Constitution. *Alden*, 527 U.S. at 715. Absolute immunity from suit in the absence of consent inhered in the nature of sovereignty under English law. *Ibid.* Blackstone explained that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765). This Court has recognized that this aspect of English political theory was never rejected by the States and that "the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden*, 527 U.S. at 715–16.

Relevant here, the preratification understanding of the immunity of States extended to suits in courts of other States. This is illustrated most prominently by the decision of the Pennsylvania Court of Common Pleas in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781). In that case, a citizen of Pennsylvania tried to attach property of Virginia located in Philadelphia Harbor. *Id.* at 77–78. The Attorney General of Pennsylvania argued "[t]hat a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws." *Id.* at 78. The Pennsylvania Court of Common Pleas agreed, holding that Virginia was immune. *Id.* at 80.

Nathan was well known to the founding generation. While the case was pending, the Virginia delegates to the Confederation Congress, including James Madison, wrote a letter that argued for the dismissal of the case because it required Virginia to risk its property without appearing or to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), *reprinted in* 3 The Papers of James Madison 184 (William T. Hutchinson et. al. eds., 1963).[3] The Virginia delegates explained that allowing the suit to proceed

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[3] This letter may be found at Founders Online, National Archives, http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=14&sr=.

would be "derogatory to the Rights of Sovereignty of the State of Virginia." *Ibid.*[4] Later, the Attorney General of Virginia, Edmund Randolph, appointed John Marshall as one of two arbitrators, pursuant to a resolution of the Virginia General Assembly, to resolve the dispute between Virginia and Nathan after the Pennsylvania court dimissed Nathan's suit. 8 THE PAPERS OF JAMES MADISON 68 n.1 (Robert A. Rutland et al. ed., 1973).[5] And four years later, the decision of the Pennslyvania court to dismiss was published in the first volume of the United States Reports. 1 U.S. (1 Dall.) at 77.

The conclusion of the court in *Nathan* was consistent with the well-established notion at the time that one sovereign was immune from suit in the court of another sovereign. The leading treatise on international law at the founding, Vattel's LAW OF NATIONS, set forth this principle clearly. Emmerich de Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 155 (Book II, Ch. 4, § 55) (J. Chitty ed., 1883). According to

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[4] The delegates noted that even if Nathan could not bring his action in Virginia's courts, "still the Case would not be without Remedy; as on Petition to the Legislature, the supreme Authority of the State, it would no doubt be attended to, and redressed." *Ibid.*

[5] This source may be accessed at http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=38&sr=.

Vattel, "[o]ne sovereign cannot make himself the judge of the conduct of another." *Ibid.* [6]

The ratification of the Constitution did nothing to abrogate the immunity that States had been understood to enjoy in the courts of other States. See *Alden*, 527 U.S. at 713 (The States retain preratification immunity "except as altered by the plan of the Convention or certain constitutional Amendments."). In fact, though there was no specific consideration of the question, statements during the ratification debates confirm that the States' immunity continued to be understood to include immunity from suit in the courts of other States.

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[6] James Madison relied on Vattel as an authoritative source of the law of nations, *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed., 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1111311113&sa=&r=36&sr=, and Thomas Jefferson explained that Vattel "ha[d] been most generally the guide" on the "law of nations," *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 7, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed. 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1311311113&sa=&r=96&sr=. Vattel was also cited in two of the State conventions to ratify the Constitution. 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 454 (hereinafter Elliot's Debates) (James Wilson citing Vattel at the Pennsylvania ratification convention); 4 Elliot's Debates 278 (Charles Pinckney explaining at the South Carolina ratification convention that Vattel was "one of the best writers on the law of nations").

In assuring the people that the States would be immune from suit in federal courts, advocates of the Constitution spoke in broad terms that presumed immunity in *all* courts, unless expressly surrendered. Alexander Hamilton explained that immunity from the suit of an individual was "inherent in the nature of sovereignty." The Federalist No. 81, p. 486 (C. Rossiter ed., 1961). Hamilton went on to explain that immunity was "now enjoyed . . . by every State in the Union" and that unless "there is a surrender of this immunity in the plan of the convention, it will remain with the States." *Id.* at 487. James Madison assured the Virginia Convention that "[i]t is not in the power of individuals to call any state into court," and John Marshall assured that Convention that "[i]t is not rational to suppose that the sovereign power Should be dragged before a court." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 533, 555 (J. Elliot 2d. ed. 1836) (hererinafter Elliot's Debates).

Even advocates of the Constitution who believed that Article III abrogated the States' immunity in federal courts made apparent an understanding that the States would still be immune from suit in the courts of other States. At least one supporter of permitting suits against States in federal court premised his argument on continued immunity in the courts of other States. Edmund Pendleton argued to the Virginia Convention that "[t]he impossibility of calling a sovereign state before the

jurisdiction of another sovereign state[] shows the propriety and necessity of vesting [a federal] tribunal with the decision of controversies to which a state shall be a party." 3 Elliot's Debates 549.

Attorney General Randolph's report on the judiciary to the House of Representatives—delivered shortly after the ratification of the Constitution—is yet more evidence that the States were understood to have retained immunity under the Constitution from suit in the courts of other States. Randolph believed this to be as settled a principle as immunity of the United States itself from suits in state courts. "In like manner," he confirmed that "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 130 (Maeva Marcus, ed., 1992). He explained that the "unconfederated" States "would be as free from mutual control as other disjoined nations." *Ibid.* The Constitution did not "narrow this exemption." *Ibid.*

All of this historical evidence demonstrates that *Hall*'s admonition that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified,"440 U.S. at 418–19, is true in one sense. "[T]he framers would not have thought such suits possible, and therefore were not worried that they would occur." Amy Woolhandler, *Interstate*

Sovereign Immunity, 2006 Sup. Ct. Rev. 249, 252. In short, "[t]he only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

Indeed, given the significance of sovereign immunity at the time, the absence of specific debate over the question of the States' immunity in sister States is itself telling. As even *Hall* recognized, "the doctrine of sovereign immunity was a matter of importance in the early days of independence," and many States were concerned about being sued in the courts of another sovereign because they "were heavily indebted as a result of the Revolutionary War." 440 U.S. at 418. Given the "well-known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is [thus] most instructive." *Alden*, 527 U.S. at 741. The best explanation for the lack of specifc debate about the abrogation of the States' immunity in the courts of other States is that this immunity "was a principle so well established that no one conceived it would be altered by the new Constitution." *Ibid.*

In fact, the question of a State's immunity in its sister States was so well understood that this Court's decisions *prior* to *Hall* had routinely described the States' immunity in terms that included immunity from suit in other States. This Court explained in 1857 that "[i]t is an established principle of jurisprudence in all civilized nations that the

sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) (explaining that the States are immune from suit in "any court in this country"). In *Hans v. Louisiana*, the Court explained that "[t]he suability of a state, without its consent, was a thing unknown to the law." 134 U.S. 1, 16 (1890). And again in 1961, less than two decades before *Hall*, this Court explained specifically that state courts had "no power to bring other States before them." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961).

Hall is thus contrary to the preratification history of sovereign immunity, the ratification debates, and the understanding of immunity leading up to the decision in *Hall*. This Court should grant certiorari to vindicate the historical immunity of the States from suit in the courts of other States, which the States retained under the Constitution.

III. *HALL* CONFLICTS WITH THE INTERESTS THAT UNDERLIE SOVEREIGN IMMUNITY.

A. Any limitation on the States' sovereign immunity is harmful to the States and undermines the interests protected by sovereign immunity. Sovereign immunity "assures the states . . . from unanticipated intervention in the processes of government." *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). States must use scarce resources

to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political judgments must be made." *Id.* at 751. A limitation of immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.* at 750.

The holding in *Hall* undermines these goals by permitting a court from another State to overrule a State's policymaking decisions. 440 U.S. at 425–27. An exercise of jurisdiction over a State by another State allows the courts of the second State to decide what policy goals the first State should pursue and how it should pursue those goals. These out-of-State suits "place an unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Alden*, 527 U.S. at 751. Worse still, the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, fisc, and policy priorities.

B. This case—in which a California state agency has been subject to litigation in an out-of-State court for more than 15 years—illustrates the problem. California taxes the income of its residents, and the Franchise Tax Board of California ("FTB") conducts audits to enforce California's tax. Gilbert Hyatt filed a tax return with California in 1991 in which he claimed that he moved to Nevada and ceased to be a resident of California days before he received

substantial patent licensing fees. Pet. App. at 4. Hyatt did not report the licensing fees on his California tax return. *Ibid.*

FTB initiated an audit on Hyatt's 1991 tax return based on these discrepancies. Pet. App. at 4. After completing the audit, FTB concluded that Hyatt had not moved to Nevada until April 1992 but had staged an earlier move to avoid California's income tax for his patent licensing income. *Id.* at 6. FTB concluded that Hyatt owed California $1.8 million in taxes from 1991 and added $2.6 million in penalties for fraud and interest. *Ibid.* A second audit concluded that Hyatt owed $6 million in taxes for 1992. *Id.* at 7.

Hyatt contested FTB's actions in both California and Nevada. California provides a procedure for administrative review of tax audits, but Hyatt did not limit his challenges to that procedure. Pet. App. at 7. Hyatt also sued FTB in Nevada court seeking declaratory relief, compensatory damages, and punitive damages for several alleged intentional torts. Pet. App. 7–8, 11.

In the Nevada courts, FTB was denied the treatment it would have received in its home courts in California. Although FTB would be completely immune from suit for an audit in California court, Cal. Gov't Code § 860.2, the Nevada courts denied complete immunity to FTB. Pet. App. 10. Instead, the Supreme Court of Nevada held that California

was entitled to "partial immunity equal to the immunity a Nevada government agency would receive" in a Nevada court. *Ibid.*

On a writ of certiorari, this Court agreed that the Full Faith and Credit Clause did not require Nevada to extend to FTB the full immunity that the agency would have received in a California court, *Franchise Tax Bd. of California v. Hyatt ("Hyatt I")*, 538 U.S. 488 (2003), though several Justices questioned whether the Court's recent decisions suggested that FTB should have sovereign immunity from suit in an out-of-State court, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42). The Court recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," but it struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in tort claims . . . arising out of its tax collection agency's residency audit." *Id.* at 498. The Court thus concluded that "[t]he Nevada Supreme Court [had] sensitively applied principles of comity." *Id.* at 499. At oral argument, some Justices suggested that *Hall* might no longer be viable and that sovereign immunity might be available, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42), but the Court ultimately declined to address the question because FTB did not ask the Court to do so. *Hyatt I*, 538 U.S. at 497.

When the case returned to the Nevada courts, matters worsened for FTB. The California state agency did not even continue to receive the same treatment that Nevada would have received. Several years after this Court's decision, a Nevada trial court conducted a four-month trial and ruled for Hyatt on each of his intentional tort claims. Pet. App. 11. Nevada law would have limited damages against Nevada, Nev. Rev. Stat. 41.035, but the Nevada trial court awarded almost half a billion dollars to Hyatt, including a $250 million punitive damages award. Pet. App. 11.

Over a decade and a half after this litigation began, the case returned a second time to the Supreme Court of Nevada, which agreed with the trial court's refusal to extend to FTB the damages cap that would have applied to the State of Nevada. Although it ruled for the California state agency on several of Hyatt's claims, the Nevada Supreme Court affirmed the imposition of damages exceeding the statutory cap because Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity." Pet. App. at 45. The court did not consider California's interest in the enforcement of its tax laws. *Id.* at 42–46.

If there were ever a cautionary tale about the potential consequences of *Hall*, this case is it. After more than a decade and a half of litigation, California remains liable for a judgment of over a

million dollars for fraud and must endure another trial to decide damages on a claim of intentional infliction of emotional distress. *Id.* at 72. And the success of this litigation has encouraged similar suits that may force FTB to alter its procedures for enforcing California's tax policies. Pet. 32–33.

Importantly, this is not the only instance in which a court of one State has exercised jurisdiction over another State in a case directly implicating the defendant State's sovereign power to establish and enact policy. State courts have exercised jurisdiction over other States in cases involving the revocation of a degree by a State university, *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala. 1992), cert. denied, 510 U.S. 1101 (1994), the firing of a State auditor, *McDonnell v. Illinois*, 725 A. 2d 126 (N.J. Super. Ct. App. Div 1999) aff'd per curiam 748 A. 2d 1105 (N.J. 2000), cert. denied 531 U.S. 819 (2000), and the treatment of indigent patients of a State-run psychiatric hospital, *Nevada v. Superior Court of California*, No. 14-1073.[7]

C. *Hall* suggested that some of the problems of permitting unconsented suits against a State in the

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[7] A petition for certiorari that also presents the question whether *Hall* should be overruled has been filed by Nevada in the last case. Petition for Writ of Certiorari, *Nevada v. Superior Court of California*, 2015 WL 981686 (U.S. Mar. 4, 2015). As noted above, West Virginia has filed a similar *amicus* brief, joined by 33 other States, in support of that request to overrule *Hall*.

courts of another State could be avoided by limiting another State's exercise of jurisdiction to situations that "pose[] no substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424 n.24. But *Hall*'s hypothetical limitation of immunity fails for at least two reasons to provide adequate protection to the States' sovereign powers.

First, no clear standard can establish which cases pose a substantial threat to cooperative federalism. See *Hall*, 440 U.S. at 429 (Blackmun, J. dissenting) ("[I]t is hard to see just how the Court could use a different analysis or reach a different result in a different case."); *id.* at 442–43 (Rehnquist, J., dissenting) ("I do not see how the Court's suggestion that limits on state-court jurisdiction may be found in principles of 'cooperative federalism' can be taken seriously."). As explained above, this Court has already examined the possibility of such a distinction under the Full Faith and Credit Clause in this case but failed to find a "principled distinction" between cases that pose a substantial threat and those that do not. *Hyatt I*, 538 U.S. at 498. Moreover, every case brought in the court of another State undermines a State's sovereignty simply because it requires the expenditure of finite resources to litigate the matter. See *Alden*, 527 U.S. at 750–51.

Second, even if this Court could devise a standard to distinguish between cases that pose a substantial threat to cooperative federalism and

those that do not, that standard is unlikely to be enforced rigorously, if at all. A state court in another State has an undeniable incentive to be less than diligent in applying such a standard in any case involving relief for that other State or its citizens, as most of these out-of-State suits do. And this Court would be the only neutral arbiter to review such assumptions of jurisdiction—a relatively distant and illusory threat for a local trial court.

* * *

The interest of a State in enacting the policies it chooses through the political process and enforcing those policies in a matter that the State deems prudent should not be—and should never have been—entrusted to the judges in the other States.[8] For this reason as well, this Court should grant certiorari and overturn *Hall*.

CONCLUSION

The petition for certiorari should be granted.

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[8] Although the Constitution permits States to retain the full scope of their immunity in their own courts, as well, many States have chosen to waive that immunity in some circumstances.

Respectfully submitted,

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No. 14-1175

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court's interpretation of Nevada Revised Statutes § 41.032(2) – Nevada's discretionary function statute – raises an issue of federal law for this Court to review.

2. Whether the Full Faith & Credit Clause requires Nevada state courts to apply California's law of sovereign immunity, in whole or in part, to a matter over which Nevada has legislative jurisdiction.

3. Whether the doctrine of comity requires Nevada state courts to apply California's law of sovereign immunity, in whole or in part, when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

4. Whether petitioner has shown a compelling justification for setting aside principles of *stare decisis* and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

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STATEMENT

1. This state-law tort suit is one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute arose out of a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit, in turn, concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. According to testimony from a former Board employee, the auditor freely discussed personal information about respondent – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about respondent. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. *See* 4/24/08 RT at 62:16-24. After she had closed the audit, she boasted about having

"convicted" respondent and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (Nev. filed Dec. 21, 2009). The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. *See* 4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12.

Within her department, Ms. Cox pressed for harsh action against respondent, including imposition of fraud penalties that were rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See, e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. And she often spoke coarsely and disparagingly about respondent and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *See, e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. *See* 83 RA at 020653-54, 020668-69, 020735-36. The Board also disclosed its investigation of respondent to respondent's patent licensees in Japan. *See* 84 RA at 020788, 020791.

The Board knew that respondent, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respect-

ing those concerns, however, the Board sought to use them as a way to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." *See* 5/22/08 RT at 80:3-81:2. Both Cowan and respondent understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.

2. Respondent brought suit against the Board in Nevada state court, asserting both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although a sovereign has no inherent sovereign immunity in the courts of a co-equal sovereign, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith & Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against respondent's state-law claims.

The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. Nevertheless, the court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," *Franchise Tax Bd. of California v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discre-

tion is abused," *id.* It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." *Id.*

The Nevada Supreme Court declined, however, to apply California's immunity law to respondent's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." *Id.* at *8. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." *Id.* at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." *Id.*, citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." *Id.*

This Court, in a unanimous opinion, affirmed. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith & Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith & Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Id.* at

494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.*

The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

3. At trial, the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy. It awarded respondent a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court, for the most part, reversed. In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to respondent's intentional infliction of emotional distress claim). And it held that, as a matter of comity, the Board was immune from any award of punitive damages.

In its opinion, the Nevada Supreme Court first examined whether Section 41.032(2) of the Nevada Revised Statutes – which provides immunity to Nevada officials performing discretionary functions – applied to the commission of intentional or bad-faith

torts. Although the court had previously held in *Falline* that Section 41.032(2) did not provide Nevada officials with such immunity, it decided to reexamine the issue because a subsequent decision had adopted a discretionary function test drawn from the similarly worded Federal Tort Claims Act ("FTCA"). *See Martinez v. Maruszczak*, 168 P.3d 720 (Nev. 2007) (adopting the test derived from *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). After considering various decisions interpreting the FTCA, the court decided to "affirm [its] holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, 'by definition, [cannot] be within the actor's discretion.'" Pet. App. 24, quoting *Falline*, 823 P.2d at 891-92 (first alteration added). Given its determination that Section 41.032(2) did not give Nevada officials immunity for intentional torts, the court went on to conclude that it would "not extend such immunity to [the Board] under comity principles, as to do so would be contrary to the policy of this state." *Id.* at 25.

Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that respondent had not established the necessary elements for various torts under Nevada law. *See id.* at 25-38. The court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." *Id.* at 40. The court also pointed to evidence that

"the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* The court thus determined "that substantial evidence supports each of the fraud elements." *Id.* at 41.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." Pet. App. 45-46. The court pointed out that officials from other States are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" *Id.* at 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.*, quoting *Faulkner*, 627 So. 2d at 366. Considering this lack of authority over other States' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." *Id.*

With respect to respondent's intentional infliction of emotional distress claim, the Nevada Supreme

Court affirmed the jury's finding of liability – noting that respondent had "suffered extreme treatment" at the hands of the Board (*id.* at 50) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to determine the proper level of damages. *Id.* at 51-62. It remanded the case to the trial court for that purpose.

Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 65. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

REASONS FOR DENYING THE PETITION

None of the issues raised by the petition merits further review. The Board's primary argument – that the Court should resolve a conflict regarding interpretation of the Federal Tort Claims Act – founders on the fact that the Nevada Supreme Court was interpreting a Nevada statute, Nev. Rev. Stat. § 41.032(2), not the federal Act. The state court's interpretation of state law presents no federal question for this Court to consider. As for the Board's arguments seeking application of California's immunity laws under the Full Faith & Credit Clause and the doctrine of comity, those arguments are squarely foreclosed by decisions of this Court establishing, first, that the Full Faith & Credit Clause does not

require courts with legislative jurisdiction to subordinate their own laws to the laws of other States, and, second, that the granting of immunity under the doctrine of comity lies wholly within the discretion of the forum State. Finally, the Board offers no good reason, let alone a compelling one, for disregarding principles of *stare decisis* and overruling *Nevada v. Hall*, 440 U.S. 410 (1979). The petition should be denied.[1]

1. The Proper Interpretation of Nevada Revised Statutes § 41.032(2) – Nevada's Discretionary Function Statute – Is a Question of State, Not Federal, Law.

The Board's flagship argument for review is that this Court needs to resolve a conflict among federal courts of appeals regarding the scope of discretionary function immunity under the Federal Tort Claims Act ("FTCA"). *See* Pet. 15-20; 28 U.S.C. § 2680(a) (FTCA). But this case has nothing to do with the FTCA. Respondent brought his tort claims against the Board pursuant to Nevada tort law, and the Board's assertion of discretionary function immunity was grounded in Nevada Revised Statutes § 41.032(2), not the federal act. Consequently, in holding that Nevada officials could not claim discretionary function immunity for intentional torts – and that out-

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[1] There is also a serious question whether the Nevada Supreme Court's decision is "final." *See* 28 U.S.C. § 1257(a). Several of the Board's asserted grounds for review challenge the amount of compensatory damages that Nevada courts may award, *see* Pet. 21-26, even though damages for the intentional infliction of emotional distress claim are still to be determined on remand. The petition thus invites the sort of "piecemeal review of state court decisions" that Section 1257(a) was meant to protect against. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

of-state officials could not either – the Nevada Supreme Court was interpreting the Nevada statute, not the FTCA. *See* Pet. App. 24 ("we conclude that *discretionary-function immunity under NRS 41.032* does not include intentional torts and bad-faith conduct") (emphasis added).

There is no reason for this Court to review that interpretation of Nevada law. The Court has often declared that state courts "have the final authority to interpret . . . that State's legislation," *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), and that this Court is "bound by a state court's construction of a state statute," *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). As a result, "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

The Board points out that, in the process of construing Section 41.032(2), the Nevada Supreme Court looked to decisions interpreting a similarly worded provision in the FTCA. *See* Pet. 18. But that commonplace practice does not turn state law into federal law. State courts routinely consult decisions from other jurisdictions – including federal courts – in order to arrive at the best interpretation of their own state law.[2] In the end, however, their interpretations of state law remain just that: interpretations of state law. Thus, "[e]ven if . . . [state] and federal

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[2] The Nevada Supreme Court followed the same practice elsewhere in the decision below, consulting cases from other jurisdictions to decide whether to recognize a false light invasion of privacy tort, *see* Pet. App. 29-32, and whether to require medical evidence as a prerequisite for an intentional infliction of emotional distress tort, *see id.* at 47-49.

statutes contain[] identical language . . . [,] the interpretation of the [state] statute by the [state] Supreme Court would be binding on federal courts." *Johnson*, 520 U.S. at 916.

Conversely, the Nevada Supreme Court's interpretation of discretionary function immunity under Section 41.032(2) has no effect on the scope of discretionary function immunity under the FTCA. The scope of immunity for federal officials under the FTCA *is* a question of federal law, and "in answering that question [a federal court is] not bound by a state court's interpretation of a similar – or even identical – state statute." *Johnson v. United States*, 559 U.S. 133, 138 (2010). Just as Nevada is free to decide that discretionary function immunity under Section 41.032(2) should be different from discretionary function immunity under the FTCA, this Court can choose a different standard for federal officials under the FTCA than Nevada has chosen for state officials under Section 41.032(2). The decision below is thus irrelevant to any "conflict" with respect to interpretation of the FTCA.

To support review here, the Board cites two cases, *see* Pet. 16 n.3, neither of which is on point. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Michigan Supreme Court expressly decided an issue of federal law, holding that a vehicle search violated the Fourth Amendment. *See id.* at 1037 n.3.[3] Likewise, in *Three*

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[3] The Michigan court also referred twice to the corresponding provision of the state constitution, *see* 463 U.S. at 1037 n.3, raising the question whether its decision rested upon an adequate and independent state ground. This Court concluded that it did not and that the Court thus had jurisdiction to review the Michigan court's resolution of the defendant's Fourth Amendment challenge to the search. *See id.* at 1044.

Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984), the North Dakota Supreme Court appeared to have determined that the federal Civil Rights Act of 1968 was "an affirmative bar to the exercise of jurisdiction" over a suit filed by an Indian tribe. *Id.* at 155. In this case, by contrast, the Nevada Supreme Court neither applied federal law (as in *Long*) nor treated federal law as "bar[ring]" the operation of any contrary state law (as in *Three Affiliated Tribes*). Rather, as it had done seven years earlier in *Martinez*, it simply "turn[ed] to federal decisions to aid in formulating a workable test for analyzing claims of immunity under NRS 41.032(2)." *Martinez v. Maruszczak*, 168 P.3d 720, 727 (Nev. 2007). *See id.* at 727 n.29 ("federal precedents are relevant in interpreting NRS 41.032(2)"); *id.* at 728 & n.32 (also reviewing immunity cases from state courts). Nothing in that reasoned approach transforms interpretation of Section 41.032(2) into an issue of federal law subject to this Court's review.

The Board's effort to convert Nevada law into federal law – solely because the Nevada Supreme Court discussed cases interpreting a similar federal statute – not only is incorrect on the merits, but, if successful, would severely diminish the authority and independence of state courts. Many state laws have analogous provisions in federal law, and it is entirely natural for state courts to consult federal decisions for guidance. Indeed, California itself made that point in a recent merits brief to this Court. *See* Reply Brief for Petitioner at 1-2, *Davis v. Ayala*, No. 13-1428 (U.S. filed Feb. 18, 2015) (arguing that "state court's discussion of federal cases" did not decide issue of federal law because "[c]ourts deciding novel issues

frequently consider how courts in other jurisdictions applying their own laws have addressed a question"). That is all that the Nevada Supreme Court did here. It construed the provisions of Nevada Revised Statutes § 41.032(2), not the Federal Tort Claims Act, and its interpretation of that state statute raises no question of federal law for this Court to review.

2. Neither the Full Faith & Credit Clause nor Principles of Comity Require a State To Subordinate Its Sovereign Interests to Those of Another State.

The Board argues that, by declining to impose a cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith & Credit Clause and principles of comity. Neither argument justifies further review.

A. The Full Faith & Credit Clause.

According to the Board, the Full Faith & Credit Clause requires the Nevada courts "to apply the [sovereign] immunity granted by California," Pet. 23, at least "to the extent consistent with Nevada law" (i.e., the damages cap in Nev. Rev. Stat. § 41.035(1)), *id.* (emphasis deleted). But the Board's continued insistence on application of California's law of sovereign immunity – once in whole, now in part – reflects its continued misunderstanding of the Full Faith & Credit Clause. Because the Full Faith & Credit Clause is primarily concerned with recognition of judgments, not the laws of other States, this Court has stressed that the Full Faith & Credit Clause does *not* compel "'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Franchise Tax Bd. of California v. Hyatt*,

538 U.S. 488, 494 (2003) ("*Hyatt I*"), quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (other internal quotation marks omitted). That principle is controlling here. This Court has already held that the Nevada Supreme Court has legislative jurisdiction over the subject matter of this case. *See id.*

The Board tries to get around that problem by asserting that a State cannot exhibit "'hostility'" towards the laws of another State. Pet. 22, quoting *Hyatt I*, 538 U.S. at 499. But it is not "hostile" for a State to apply its own law – rather than the law of another State – to a matter over which it has legislative jurisdiction. "[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Emp'rs Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders"). In applying Nevada law to this dispute, therefore, the Nevada Supreme Court was doing nothing more than the Constitution entitles it to do.[4]

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[4] Contrary to the Board's assertion, the Nevada Supreme Court did not "create[] an exception to its own law." Pet. 25 (emphasis deleted). The cap on damages is an integral part of Nevada's waiver of sovereign immunity in its own courts, and it thus applies, by its plain terms, only to Nevada officials. The law makes no mention of officials from other States because those States do not have sovereign immunity in Nevada courts. *See Nevada v. Hall*, 440 U.S. at 416.

In any event, the Court has also made clear that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. at 422. Here, the Nevada Supreme Court specifically explained why granting the immunity sought by the Board would undermine Nevada's interest in protecting its residents from deliberate attacks by other sovereigns. The court noted that, unlike officials from other States, Nevada officials "'are subject to legislative control, administrative oversight, and public accountability'" in Nevada. Pet. App. 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). *See, e.g.*, Nev. Rev. Stat. § 284.385(1)(a) (authorizing dismissal or demotion of employees for "the good of the public service"); Nev. Admin. Code § 284.650(1), (4) (authorizing discipline for "[a]ctivity which is incompatible with an employee's conditions of employment" and for "[d]iscourteous treatment of the public . . . while on duty"). As a result, it noted, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while there is no comparable safeguard against state officials that "'operate[] outside such controls in this State.'" Pet. App. 45, quoting *Faulkner*, 627 So. 2d at 366.

The Board does not quarrel with this reasoning, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it cannot exert influence over their apparent willingness to violate Nevada's tort laws. Consequently, it had no ability to rein in California tax officials once they embarked upon an offensive, and wholly inappropriate, personal campaign to "get" a Nevada resident. Instead, Nevada was left with

the after-the-fact option of awarding compensation for the harm caused by the Board's deliberate and malicious acts. The Nevada Supreme Court's decision to allow full compensation – rather than directly or indirectly giving priority to California's immunity laws – was well within the bounds of Nevada's own sovereign authority.

B. Comity.

As an alternative, the Board argues that Nevada was required to apply California's law of sovereign immunity – again, above the amount of the damages cap applicable to Nevada officials – as a matter of comity. *See* Pet. 23. But the Board cites no case in which this Court has ordered a state court to grant either partial or total immunity to another State as a matter of comity. That omission is hardly surprising. As this Court has long observed, the decision of one sovereign to grant immunity to a co-equal sovereign lies solely within its own discretion.

The authority on this point is clear and longstanding. Beginning in the early Nineteenth Century, this Court has stated repeatedly that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), for example, the Court declared that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," stressing that "[i]t is susceptible of no limitation not imposed by itself." *Id.* at 136. Since that time, the Court has consistently followed the basic principle that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Court has applied the same principle to relations between the individual States. In *Nevada v. Hall*, the Court rejected a claim that Nevada had inherent sovereign immunity in California's courts, noting that, unlike a sovereign's assertion of immunity in its own courts, "[s]uch a claim necessarily implicates the power and authority of a second sovereign." 440 U.S. at 416. Because "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another," *Alden v. Maine*, 527 U.S. 706, 738 (1999), the source of any immunity for a State in the courts of another State "must be found either in an agreement, express or implied, between the two sovereigns, or in the *voluntary* decision of the second to respect the dignity of the first as a matter of comity," *Nevada v. Hall*, 440 U.S. at 416 (emphasis added). It is thus for each State to decide, in its discretion, whether it would be consistent with its sovereign interests to grant immunity to a sister State. *See Hyatt I*, 538 U.S. at 498 (rejecting Board's attempt to "elevate California's sovereignty interests above those of Nevada").

Saying that the Nevada Supreme Court did not "sensitively" apply principles of comity, the Board urges this Court to invent a new *mandatory* principle of state-to-state comity, effectively granting all States the same immunity that forum States enjoy in their own courts. *See* Pet. 23. But the idea of "mandatory comity" is a contradiction in terms. Nothing in the Constitution tells a State how it must exercise its discretion in providing immunity to another State, any more than the Constitution tells the United States how much immunity it must extend to a foreign State. *See Verlinden B.V.*, 461 U.S. at 486. Thus, while state courts often use the immunity of their own officials as a "benchmark" for granting

immunity to officials from other States, they do so as a matter of grace, not obligation. As *Nevada v. Hall* firmly established, that "voluntary" decision is left to the sovereigns themselves, informed by mutual respect and a desire for advantageous reciprocity.

A newly fashioned doctrine of "mandatory comity" would also be wholly out of place in this context. Although the Board says that principles of comity should require a State to "'recognize another state's laws to the extent that they do not conflict with its own,'" Pet. 23, quoting Pet. App. 44, it would be strange indeed to impose that kind of binding obligation under the doctrine of comity when the Full Faith & Credit Clause – a constitutional provision directly addressing the extent to which one State must "recognize another state's laws" – imposes no such duty. *See* pages 13-16, *supra*. Of course, the Full Faith & Credit Clause *does* require a forum State to recognize another State's laws when the forum State lacks legislative jurisdiction, but that is not the case here. *See Hyatt I*, 538 U.S. at 494. Thus, under both the Full Faith & Credit Clause and principles of comity, a state court with proper authority over the subject matter may apply its own laws in preference to foreign laws when, in its judgment, application of the foreign laws would conflict with its sovereign interests.

Applying traditional principles of comity here, the Nevada Supreme Court in fact went to great lengths to "respect the dignity" of its neighboring State. Far from treating the Board "just as any other litigant," *Nevada v. Hall*, 440 U.S. at 427 (Blackmun, J., dissenting), the court shielded the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court held that the Board should be absolutely

immune from liability for its negligent acts, and it relieved the Board of the obligation to pay any punitive damages, solely because of its status as a co-equal sovereign. And, in the one instance where the Nevada court departed from the "benchmark" of liability for its own officials, it explained just why it had decided to do so. That respectful treatment hardly shows a lack of "sensitiv[ity]" to the standing of a co-equal sovereign.[5]

Finally, we note the irony created by the Board's attempt to invoke (albeit, at second hand) the protection of a damages cap for Nevada officials under Nevada law. It may be recalled that, when the shoe was on the other foot in *Nevada v. Hall*, Nevada officials sought protection under the very same Nevada law in the California courts, only to be told by the California courts that they would not apply it. *See* 440 U.S. at 412-13 (discussing California proceedings). As a result, Nevada officials were exposed to unlimited damages in California for a claim of negligence. Here, of course, Nevada voluntarily accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself obligated to pay damages at all only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at causing harm to a Nevada resident. Given these circumstances, the Board's demand for additional immunity is particularly unjustified.

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[5] As a further sign of respect for the Board, the Nevada court reversed the jury's award of damages on the intentional infliction of emotional distress claim, finding that the trial court had improperly allowed consideration of issues that were being contested in the independent California tax proceedings. *See* Pet. App. 53-57.

3. There Is No Compelling Justification for Overruling *Nevada v. Hall.*

The Board concludes its list of issues for review by urging the Court to overrule *Nevada v. Hall.* The Court has declined this invitation on a number of previous occasions, including in this very case. *See* Petition for Certiorari at 9-26, *Montana Bd. of Invs. v. Deutsche Bank Sec., Inc., cert. denied*, 549 U.S. 1095 (2006) (No. 06-291), 2006 WL 2519589; Petition for Certiorari at 9-13, *Illinois v. McDonnell, cert. denied*, 531 U.S. 819 (2000) (No. 99-1934), 2000 WL 34013543; *Hyatt I*, 538 U.S. at 497. It should do so again now.[6]

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality). Indeed, just last Term, this Court again reaffirmed that it "does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," *Hilton*, 502 U.S. at 202, the Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification," *id. See also Bay Mills*, 134 S. Ct. at 2036 ("'[A]ny departure' from the doctrine 'demands special justification.'"), quoting *Arizona v. Rumsey*, 467 U.S.

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[6] The Board does not discuss its failure to raise this issue many years ago in *Hyatt I.* Even if sovereign immunity can be raised at any time, the Board's prior default makes its current 11th-hour plea a poor candidate for undoing well-established law.

203, 212 (1984). There is no compelling justification here.

Contrary to concerns expressed by the dissenters in *Nevada v. Hall*, the Court's decision in that case did not "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting to our federal system." 440 U.S. at 427 (Blackmun, J., dissenting). To the contrary, suits against States in state court – rare before the decision in *Nevada v. Hall* – are still rare today. Furthermore, in those infrequent instances when such suits have been filed, state courts have typically relied on the voluntary doctrine of comity to extend broad protections to their sister States, as the Nevada Supreme Court did here. *See, e.g.*, *Cox v. Roach*, 723 S.E.2d 340 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006); pages 18-19, *supra*. The decision in *Nevada v. Hall* thus caused no problem that this Court needs to address.

Presumably for that reason, the Board stakes its claim for overruling *Nevada v. Hall* on doctrinal grounds. Relying heavily on *Alden v. Maine*, the Board argues that the law of sovereign immunity has changed significantly in recent years and that *Hall* is out of step with the new trend. *See* Pet. 28. But the Court in *Alden* expressly distinguished the absolute right of a sovereign to immunity in its own courts (the issue in *Alden*) from its lack of right to sovereign immunity in the courts of another sovereign (the issue in *Hall*). *See* 527 U.S. at 738-40. Taking its cue from (rather than questioning) *Hall*, the Court pointed out that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738, quoting 440 U.S. at 416. And it again declared that "the Constitution did not reflect an agreement between the States to

respect the sovereign immunity of one another." *Id.* *See also id.* at 739 (expressing "reluctance to find an implied constitutional limit on the power of the States").

The Board (and *amici* States) assert that, at the time of the Convention, independent sovereigns traditionally accorded immunity to other sovereigns in their courts. *See* Pet. 28-29; States' Br. 11-14. This adds nothing new. In *Nevada v. Hall* itself, this Court explicitly recognized the historical practice of granting immunity to other sovereigns. *See* 440 U.S. at 417. What the Court also pointed out, however, is that sovereigns extended this immunity, not as a matter of absolute right, but as a matter of comity. *See id.* at 416-18; *see also Bay Mills*, 134 S. Ct. at 2046-47 (Thomas, J., dissenting) ("Sovereign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another."). That is still the case today. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014). Thus, both history and long experience squarely contradict the already-rejected theory that sovereigns may demand immunity in the courts of other sovereigns as a matter of absolute privilege.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Of course, the States need not rely exclusively on the doctrine of comity in their quest for greater immunity in other States' courts. If both California and Nevada believe that expanded immunity is appropriate, *see* Petition for Certiorari, *Nevada v. City & Cnty. of San Francisco*, No. 14-1073 (U.S. filed Mar. 4, 2015), 2015 WL 981686, the two States are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all States sharing similar views.

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In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

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REPLY BRIEF FOR PETITIONER

This suit, in which a private citizen has haled the sovereign taxing authority of California into Nevada state court against its will, has dragged on for seventeen years, imposing untold costs upon California even before accounting for the damages awarded below. And there is no end in sight—unless this Court grants certiorari and reaffirms or reestablishes key principles of sovereign immunity. Hyatt provides no principled reason to deny review of the exceptionally important questions presented here.

As to the first question, Hyatt effectively concedes a split over discretionary-function immunity, and rests his opposition on the claim that there is no federal issue for this Court to review. But it is well established that where, as here, a state court's construction of state law is premised on a misconception of federal law, this Court may review the mistaken understanding of federal law. As to the second question, Hyatt concedes that there is a federal issue, but then argues for a toothless version of comity and full faith and credit inconsistent with the principles this Court set forth—at Hyatt's own urging—in *Franchise Tax Board of California v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). If sovereign States can be haled into their sister sovereigns' courts by citizens of those States, the minimum protection they need is to be afforded the same immunities as the sister sovereign. If comity and full faith and credit do not provide even that minimal protection, then the need to revisit *Nevada v. Hall*, 440 U.S. 410 (1979), is truly acute. As to that third question, Hyatt offers only a perfunctory defense of *Hall*'s reasoning, relying

instead on *stare decisis*. But almost every *stare decisis* consideration militates against preserving *Hall*, an aberration in this Court's modern sovereign immunity doctrine. At the very least, with forty States, including Nevada, asking this Court to overrule *Hall*, the question surely merits plenary consideration.

I. This Court Should Grant Review To Determine Whether The Federal Discretionary-Function Immunity Rule Is Categorically Inapplicable To Intentional Torts And Bad-Faith Conduct.

Effectively conceding the split of authority on the scope of discretionary-function immunity, Hyatt offers only one argument against review of the first question presented: the Nevada Supreme Court's "interpretation of [NRS §41.032(2)] raises no question of federal law for this Court to review." Opp.13. Hyatt is incorrect.

It is "well established" that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 152 (1984). Thus, in *Three Affiliated Tribes*, the Court fully acknowledged—as Hyatt argues, Opp.10—that it ordinarily defers on "question[s] of state law over which the state courts have binding authority." 467 U.S. at 151. But it added an equally important caveat that Hyatt essentially ignores: this Court has jurisdiction "[i]f the state court has proceeded on an incorrect perception of federal law," or its "interpretation of" a state statute "rest[s] on a misconception of federal law." *Id.* at 152-53; *see*

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (jurisdiction when "state court decision fairly appears ... to be interwoven with the federal law" such that "independence" of state-law ground is unclear). The Court reaffirmed these principles in *Ohio v. Reiner*, 532 U.S. 17 (2001), adding that it also has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *Id.* at 20.

Under these well-established principles, there is clearly a question of federal law for this Court to review. In construing Nevada's discretionary-function immunity statute, the Nevada Supreme Court relied solely on the "federal two-part test for determining the applicability of discretionary-function immunity" under 28 U.S.C. §2680(a), which the court had previously adopted for construing Nevada's "practically identical" provision. App.14-15; *Martinez v. Maruszczak*, 168 P.3d 720, 727 n.29 (Nev. 2007). That federal two-part test derives from this Court's decisions in *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991). The Nevada court thoroughly reviewed the federal test, App.15, 17-18, looked exclusively to federal circuit decisions to determine whether the federal test encompasses bad-faith conduct or intentional torts, App.19-23, observed that the federal circuits have split over "how broadly [they] apply" this Court's decisions articulating the federal test, App.24, and followed the minority approach, *id.*; IMLA Br.9-12.

In every relevant respect, therefore, the Nevada court's construction of NRS §41.032(2) was interwoven with its (mis)perception of federal law—specifically,

the interpretation and applicability of the federal *Berkovitz-Gaubert* test. Accordingly, there is a federal issue this Court may review. *See, e.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) ("[T]he fact that the state court relied to the extent it did on federal grounds requires us to reach the merits.").

Hyatt suggests that *Three Affiliated Tribes* is limited to circumstances where a state court simply treated federal law as "'an affirmative bar to the exercise of jurisdiction,'" Opp.12 (quoting 467 U.S. at 155), and *Long* is limited to circumstances where a state court simply "applied federal law." *Id.* But nothing in those decisions or common sense indicates those limits. If a state-court decision is premised on a misconstruction of federal law, this Court has the final word on the proper construction of federal law and has jurisdiction to correct the mistake.

Hyatt further argues that the "commonplace practice" of looking to decisions interpreting similar statutes "does not turn state law into federal law." Opp.10. True enough, but there is a critical difference between a state-court decision considering federal-court decisions as persuasive authority, and a state-court decision adopting federal law as the state-law standard to obtain the benefit of more developed federal law. In the latter circumstance, which this case involves, it is "well established" that this Court can correct a misconstruction of federal law.

That feature distinguishes Hyatt's leading case, *Johnson v. Fankell*, 520 U.S. 911 (1997). There, the issue was whether a state court construing state law "must follow the federal construction" of the term "final decision" in 28 U.S.C. §1291. *Id.* at 916. The

Court held, unsurprisingly, that the state court had "a choice" whether to adopt the federal standard as its own. *Id.* at 918. But once a state chooses to adopt federal law, its interpretations of federal law are not immune from this Court's review. Here, the Nevada Supreme Court exclusively premised its decision on an interpretation of federal law that has split the circuits. Hyatt's contention that addressing that misinterpretation of federal law is beyond this Court's jurisdiction is wrong, and he offers no other argument against review of this important question.[1]

II. This Court Should Grant Review To Determine Whether Comity And Full Faith And Credit Principles Require A State To Extend To Sister States The Same Immunities It Enjoys In Its Own Courts.

Unlike the first question presented, Hyatt fully acknowledges that the second question presented raises federal issues this Court may review. Hyatt contends instead that principles of comity and full

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[1] Hyatt's tepid contention that there is a "serious question" regarding jurisdiction under 28 U.S.C. §1257(a), Opp.9 n.1, lacks merit. This Court may review state-court decisions "in which there are further proceedings—even entire trials—yet to occur ... but where ... the federal issue is conclusive," or where "the federal issue ... will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975). Immunity questions are classic examples of issues satisfying the *Cox* standard. Two of the three questions presented here would end this case if decided for FTB; all will survive regardless of future proceedings that may be unnecessary. Exercising jurisdiction clearly would "avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 477-78. The Court recognized these principles in granting review of the interlocutory petition in *Hyatt I*.

faith and credit do not require Nevada to grant a sister sovereign involuntarily haled into Nevada courts the same immunities Nevada enjoys. That argument largely ignores the equal-treatment premise that, at Hyatt's urging, *Hyatt I* embraced. Pet.21. But if Hyatt is correct and federal law does not require Nevada to treat sister sovereigns at least as well as Nevada treats its own agencies, then the regime of *Nevada v. Hall* is truly unsustainable. *Hall* itself hinted that its rule might not apply to taxing authorities, which tend not to be popular even in home-state courts. 440 U.S. at 424 n.24. *Hyatt I* rejected that proposition, but softened the blow by more than hinting that FTB would be entitled to at least the protections Nevada affords its own state actors. 538 U.S. at 498-99. If neither of those principles holds true, as Hyatt now insists, then a sovereign State is truly at the mercy of a sister sovereign when haled into court by a private citizen against its will. That proposition is antithetical to the constitutional design and this Court's post-*Hall* sovereign immunity decisions.

Hyatt has no real response to the Nevada Supreme Court's failure to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* at 499. Indeed, his efforts at defending the analysis below only underscore that the decision below lacked a "healthy regard for California's sovereign status." *Id.*; Pet.24-25. Hyatt emphasizes that the Nevada court refused to grant FTB the protections given a Nevada agency because California's officials are not "subject to legislative control, administrative oversight, and public accountability *in Nevada*." Opp.15 (emphasis

added). Of course not; but California agencies are subject to all those checks *in California*. And if respect for a sister sovereign means anything, it means respecting the governmental processes of the sister State, not dismissing them because they will occur in Sacramento rather than in Carson City. Indeed, a sister sovereign's agencies will never be subject to substantial legislative control and oversight in *Nevada*, so the decision below is a recipe for never extending comparable immunity to a sister sovereign. That is hardly the "healthy regard" envisioned in *Hyatt I*.

Hyatt disparages FTB's "continued insistence on application of California's law of sovereign immunity," and dismisses "mandatory comity" as an oxymoron. Opp.13-14, 17. But FTB does not seek application of California's sovereign immunity rule; it seeks application of *Nevada's* sovereign immunity rule. And there is no reason why comity (or full faith and credit principles) cannot give rise to a bright-line rule that sister sovereigns haled into court against their will receive at least the same immunities as a home-state agency under comparable circumstances. Indeed, if comity, full faith and credit, and *Hyatt I* do not embody even that minimal protection for a sister sovereign, then *Nevada v. Hall* is not just flawed but wholly unsustainable.

III. This Court Should Grant Review To Overrule *Nevada v. Hall*.

Faced with powerful historical and doctrinal evidence that *Nevada v. Hall* was wrongly decided and some forty States asking this Court to revisit it, Hyatt makes only a perfunctory attempt to defend *Hall* as

correctly decided. Instead, he emphasizes *stare decisis*, Opp.20-21, hoping this Court will remain "consciously wrong today because [it] was unconsciously wrong yesterday," *Massachusetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting). But Hyatt fails to acknowledge that almost every *stare decisis* consideration militates *against* retaining *Hall*. Pet.35.[2]

Hyatt claims, remarkably, that in exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "caused no problem that this Court needs to address." Opp.21. At least forty States—including Nevada itself—beg to differ. *See* States' Br.1-2, 18-25. This case illustrates why: a private individual has dragged a sovereign State through ten years of pretrial litigation, a four-month trial resulting in a nearly half-*billion* dollar verdict, another seven years (and counting) of post-trial litigation, and the possibility of a new trial. This ongoing saga has not only demeaned the State's sovereign dignity, but also subjected it to untold financial and administrative burdens. Pet.32-34; States' Br.19-23.

Both the support of forty States and Hyatt's defense of the decision below belie his claim (at 21) that the "voluntary doctrine of comity" sufficiently protects State sovereignty. If "comity" really is as voluntary as Hyatt insists, then it is a wholly

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[2] Hyatt identifies no vehicle issue impeding review. He faults FTB (at 20 n.6) for failing to press this question in *Hyatt I*, but correctly concedes that sovereign immunity can be raised at any time, *see Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), and does not dispute that the issue was raised below.

insufficient substitute for the sovereign immunity implicit in the constitutional design that *Hall* eliminated.

While this case is an unusually egregious example, similar suits against non-consenting sovereign States are nowhere near as "rare" as Hyatt imagines, Opp.21. *See, e.g.*, *Montaño v. Frezza*, ___ P.3d ___, 2015 WL 1275366 (N.M. Ct. App. Mar. 19, 2015); *Atl. Coast Conference v. Univ. of Md.*, 751 S.E.2d 612 (N.C. Ct. App. 2013); *Athay v. Stacey*, 196 P.3d 325 (Idaho 2008). Indeed, Nevada itself has a pending petition for certiorari asking this Court to reconsider *Hall*. *See Nevada v. City & Cnty. of S.F.*, No. 14-1073, 2015 WL 981686 (Mar. 4, 2015).[3] Nor is there any reason to think that tax authorities will suddenly become popular with out-of-state juries, or that individuals reaping windfalls will not be tempted to assert that their move to a low-tax jurisdiction predated their windfall. The problems engendered by *Hall* are real and are not going away. *See* Multistate Tax Comm'n Br.3-7.[4]

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[3] Nevada's petition confirms that *Hall* should be reconsidered, but the Court should not grant that petition as an alternative to this one. Among other things, respondent there claims that the decision rests on an adequate and independent state procedural ground. This case involves no comparable objection and, more importantly, allows the Court to consider the continuing viability of *Hall* in conjunction with the comity and full faith issues raised in question two. As noted, if those doctrines really are as toothless as Hyatt insists, that provides an additional justification for overruling *Hall*.

[4] Hyatt alludes to two previous unsuccessful efforts to seek *Hall*'s demise. But this Court has not considered such a petition for nearly a decade, and both earlier efforts were undesirable

On *Hall*'s merits, the brief in opposition speaks louder by its silence than its words. Hyatt does not contest that *Hall* runs contrary to the Framers' understanding that one State cannot be sued in another State's courts absent consent, or that allowing such suits in another State's courts but not federal courts defies reason. Pet.28-30; States' Br.9-17. And he has no response to this Court's numerous cases explaining that a State "cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added); Pet.26, 30; States' Br.17-18.

Hyatt contends (at 21-22) that *Hall* does not conflict with *Alden v. Maine*, 527 U.S. 706 (1999). That argument misses the point. If *Alden* had overruled *Hall* rather than distinguished it, this case would have been dismissed a decade and a half ago. *Alden* clearly resolved a different issue, but its reasoning echoes the *Hall* dissent and underscores *Hall*'s incompatibility with a whole host of sovereign immunity decisions that followed it. If sovereign immunity is understood as narrowly demarcated by the metes and bounds of the Eleventh Amendment's text, then *Hall* may be defensible. But once sovereign immunity is understood as a "fundamental postulate[]

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vehicles and predated subsequent developments in sovereign immunity law. In one, a state agency insisted on greater sovereign immunity in its sister sovereign's courts than it would enjoy in its own courts. *Mont. Bd. of Invs. v. Deutsche Bank Sec.*, 549 U.S. 1095 (2006). The other was filed only shortly after *Alden v. Maine*, 527 U.S. 706 (1999), clarified the contours of State sovereign immunity, and involved a *pro se* respondent. *Illinois v. McDonnell*, 513 U.S. 819 (2000).

implicit in the constitutional design" that derives not exclusively from the Eleventh Amendment but "from the structure of the original Constitution itself," *id.* at 728-29, then *Hall* is wholly unsustainable. *See* Pet.30-31. Contrary to this now-established view, *Hall* explicitly refused to acknowledge any immunity "by inference from the structure of our Constitution," and intentionally departed from "the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418, 426.

Hyatt also suggests that sovereign immunity in this context is not an "absolute right" but merely a "matter of comity," which Hyatt insists is a wholly voluntary concept. Opp.22. That may be true for foreign nations, *Republic of Arg. v. NML Capital*, 134 S. Ct. 2250, 2255 (2014); but it is emphatically *not* true for the several States, whose sovereign immunity is guaranteed by the Constitution. *See Alden*, 527 U.S. at 728-29. The very dissenting opinion Hyatt cites recognizes this critical distinction. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2046-47 & n.1 (2014) (Thomas, J., dissenting) (explaining that while sovereign immunity normally is not a freestanding right, "State sovereign immunity is an exception" because it is "secured by the Constitution").

Grasping at straws, Hyatt asserts that there is no need for this Court to overturn *Hall* because States could "enter into an agreement to provide immunity in each other's courts." Opp.22 n.7. But that patchwork solution gets sovereign immunity exactly backwards. State sovereign immunity is the baseline guaranteed to the States by the Constitution's structure. A State can make a special, voluntary agreement to *waive* that

immunity, *see Edelman v. Jordan*, 415 U.S. 651, 673 (1974), and as a sovereign, it may do so without anyone else's consent. But as a sovereign, it hardly needs a special agreement or anyone else's consent to *assert* that immunity. If the problems of *Hall* can only be solved by a novel use of the Compact Clause, that is yet another in the long line of reasons to overrule *Hall*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

2. Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

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INTRODUCTION

Over twenty years ago, petitioner Franchise Tax Board of the State of California (FTB) audited respondent Gilbert P. Hyatt and determined that he had misrepresented the date of his purported move to Nevada and owed substantial income taxes and penalties to California. Rather than simply exhaust California's administrative remedies or file suit in California state court, Hyatt sued FTB in Nevada state court, alleging that FTB committed various torts in conducting its audits and owed Hyatt hundreds of millions of dollars in damages.

The FTB's odyssey in Nevada lasted a decade—including an earlier trip to this Court—before the case even reached trial. Then, in a trial fraught with legal error, the Nevada jury returned a verdict that dramatically demonstrates the dangers of having a sovereign State haled into another State's courts against its will: The jury found for Hyatt on every one of his claims and awarded him nearly half a billion dollars in damages. It took another six years for the FTB to procure an appellate decision that, while trimming the award, still awarded a million dollars in damages while denying FTB the benefit of the damages cap Nevada extends to its own government entities.

The Nevada Supreme Court's decision cannot stand. Its refusal to afford a sister sovereign the same protections Nevada enjoys in its own courts is inconsistent with this Court's previous decision in this very case and basic principles of comity. But the proceedings here illustrate the far more profound difficulties of allowing one sovereign to be haled into

the courts of a sister sovereign at the behest of a private citizen. Such suits were unknown at the Framing and for nearly two centuries afterward. Although this Court permitted such a suit in *Nevada v. Hall*, 440 U.S. 410 (1979), that decision was incorrect when decided, is incompatible with subsequent decisions, and has proven unworkable in practice. There is no question that the States enjoyed sovereign immunity from suit in each others' courts at the Framing, and nothing in the structure of the Constitution remotely suggests that the States possess sovereign immunity in both their own courts and in federal court, but not in the courts of another State.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 335 P.3d 125 and reproduced at Pet.App.1-73. The order of the Nevada Supreme Court denying rehearing is unreported and reproduced at Pet.App.74-75. The relevant orders of the state trial court are unreported but reproduced at Pet.App.78-81.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2014, and denied rehearing on November 25, 2014. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

Articles III and IV of the United States Constitution and the Eleventh Amendment to the Constitution are reproduced in the appendix to this brief at 1a-5a.

STATEMENT OF THE CASE

A. Factual Background

Gilbert Hyatt was a longtime resident of California. Pet.App.4; *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 490-91 (2003). In 1992, Hyatt filed a "part-year" resident income tax return in California for the year 1991, claiming that as of October 1, 1991, he had ceased to be a California resident and had moved to Nevada. *Hyatt I*, 538 U.S. at 490. Within days after that purported move, Hyatt received substantial income in connection with a patent he then owned. *Id.* at 490-91; Pet.App.4.[1] Hyatt did not report that significant income on his California return; indeed, he reported to California only 3.5% of his total taxable income for 1991 despite residing there for at least 75% of the calendar year.[2] And despite the conveniently-timed supposed change of residence, Hyatt claimed no moving expenses on his 1991 federal return. Pet.App.4.

Based on these discrepancies, in 1993, FTB opened an audit concerning Hyatt's 1991 California return to ascertain the legitimacy of Hyatt's asserted change of residence. FTB is a California agency with the statutory duty to administer and enforce

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[1] That patent's relevant claims were canceled in 1996 after another individual was determined to have priority of invention. *See Hyatt v. Boone*, 146 F.3d 1348, 1350-51 & n.1 (Fed. Cir. 1998); John Markoff, *For Texas Instruments, Some Bragging Rights*, N.Y. Times (June 20, 1996), http://perma.cc/55gz-kul8.

[2] Under California law, taxpayers are presumed to have lived in California for the full year—and all their income is taxable to California—if they lived in California for at least nine months. Cal. Rev. & Tax Code §17016.

California's personal income tax law. Cal. Rev. & Tax Code §19501. It has the authority to examine records, require attendance, take testimony, and issue subpoenas. *Id.* §19504. Exercising these sovereign powers, and following standard practice, FTB sent Hyatt a form requiring him to provide certain information concerning his connections to California and Nevada and the facts surrounding his claimed move to Nevada. Pet.App.4-5. Using that information, FTB sent letters and demands for information to third parties. Pet.App.5. FTB representatives also interviewed third parties and visited locations in California and Nevada. Pet.App.5-6.

As a result of its audit, FTB concluded that Hyatt did not move from California to Nevada by October 1, 1991, as he had claimed, but rather remained a California resident until April 3, 1992, and had filed a fraudulent 1991 California return. Pet.App.4-5; *Hyatt I*, 538 U.S. at 491. It determined that, "in an effort to avoid [California] state income tax liability on his patent licensing," Hyatt "had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote." Pet.App.6. It further determined that although Hyatt claimed he had sold his California home to his work assistant, the purported sale was a "sham." *Id.* FTB provided a "detailed explanation" supporting its conclusions. *Id.* It cited evidence regarding, among other things, Hyatt's "contacts between Nevada and California, banking activity in the two states, ... location in the two states during the relevant period, and professionals whom he employed in the two states." *Id.*

FTB determined that Hyatt owed California approximately $1.8 million in unpaid state income taxes from 1991, plus an additional $2.6 million in penalties and interest. *Id.* Because it determined that Hyatt resided in California for part of 1992 yet paid no California taxes at all, FTB opened a second audit into Hyatt's state income tax liability for that year. Pet.App.7. It concluded that Hyatt owed an additional $6 million in taxes and interest for 1992, along with further penalties. *Id.*

Hyatt challenged the audits by filing protests with FTB. *Id.*; *see* Cal. Rev. & Tax Code §19041. Those protests initiated an administrative review process under which both audits were examined again to ensure their accuracy. FTB affirmed the audits after further administrative review. Pet.App.7. Hyatt is currently challenging that outcome in an administrative appeal to the California State Board of Equalization. *See* Cal. Rev. & Tax Code §§19045-19048.[3]

B. The Nevada Litigation

In January 1998, after filing his administrative protests to FTB's determinations, Hyatt filed suit against FTB in Nevada state court. He asserted a full range of tort claims based on FTB's alleged conduct during its audit—negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a

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[3] The decision below erroneously stated that Hyatt is challenging the audits' conclusions "in California courts." Pet.App.7 n.2. Hyatt will have an opportunity to file suit in California court if the State Board of Equalization upholds FTB's determinations. *See* Cal. Rev. & Tax Code §§19381-19382.

confidential relationship—and sought both compensatory and punitive damages. Pet.App.7-8, 11.

FTB moved for summary judgment, asserting its immunity from the entire lawsuit on several grounds. As relevant here, it argued that as an agency of the State of California, it was constitutionally immune from suit in the Nevada courts. It alternatively argued that it was entitled to the benefit of California law, which provided a complete immunity from the suit. Pet.App.10. In recognition of the need to protect the distinctly sovereign and inherently unpopular function of tax collection, California law prohibits "[i]nstituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," and immunizes any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of comity and sovereign immunity, required the Nevada courts to apply California law immunizing FTB's actions. *Hyatt I*, 538 U.S. at 491-92.

The trial court denied the motion, and the Nevada Supreme Court affirmed in part and denied in part a petition for mandamus. *Id.* at 492. It first held that, as a constitutional matter, "although California is immune from Hyatt's suit in federal courts, it is not immune in Nevada courts." J.A.167 (citing *Nevada v. Hall*, 440 U.S. 410 (1979)). Next, it refused to afford FTB the complete immunity granted to it by California law. It suggested instead that "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive" under

Nevada law, which meant immunity for negligence-based torts but not for intentional torts. Pet.App.10 The court therefore ordered the dismissal of Hyatt's claim for negligent misrepresentation but allowed his intentional tort claims to proceed.

C. *Hyatt I*

FTB filed a petition for certiorari, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. This Court granted certiorari. Hyatt defended the judgment by noting that the Nevada Supreme Court had "look[ed] at [Nevada's] own immunity" and granted California "that same" immunity. J.A.185. A State's "own immunity," Hyatt asserted, was the "baseline" for determining the immunity owed to sister States haled into its courts. J.A.186; *see also* J.A.189 ("We are treating the other sovereign the way we treat ourselves.").

The Court affirmed. It explained that the Full Faith and Credit Clause generally does not require one State to apply another State's law. *Hyatt I*, 538 U.S. at 496. Although it recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," it held that the Full Faith and Credit Clause did not require Nevada to respect that sovereign interest by giving FTB the complete immunity that it would have under California law. *Id.* at 498-99.

In reaching that conclusion, the Court acknowledged that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* at 499. But it observed that it was "not presented here with a case in which a State has exhibited a 'policy of

hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Reflecting Hyatt's repeated insistence that the Nevada Supreme Court had merely granted FTB the same immunity that a Nevada agency would enjoy under similar circumstances—thereby placing California on an equal footing with Nevada—the Court commented that the Nevada Supreme Court had "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit" to determine what immunity FTB was entitled to claim. *Id.*

The Court also emphasized that its ruling did *not* address the broader issue of whether the Constitution incorporates a principle of State sovereign immunity that protects a State from being sued in the courts of a sister State without its consent. *Id.* at 497. In *Nevada v. Hall*, the Court had rejected that proposition, holding that the Constitution did not "require[] all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418. In *Hyatt I*, nineteen States and Puerto Rico filed an amicus brief that urged the Court to revisit and overrule *Hall*. *See* Br. of Florida et al. as Amici Curiae Supporting Pet'r, *Hyatt I*, 538 U.S. 488 (2003) (No. 02-42), 2002 WL 32134149. But because FTB itself did not seek to overrule *Hall* at that time, the Court declined to reach the issue. *Hyatt I*, 538 U.S. at 497.

D. Trial and Appeal

Following *Hyatt I*, the case returned to the Nevada state trial court. The parties then engaged in lengthy discovery and pretrial proceedings. Finally,

in 2008—over ten years after Hyatt filed suit—the case proceeded to a four-month jury trial. Pet.App.11. The Nevada jury found for Hyatt on all his claims, awarding him just over $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for intentional infliction of emotional distress, and $250 million in punitive damages. *Id.*

Nevada has partially waived the sovereign immunity of Nevada government agencies for intentional torts. It allows such suits but imposes a statutory cap on tort damages. Nev. Rev. Stat. §41.035(1). For actions accruing before 2007 (like Hyatt's), that cap was set at $50,000—less than one one-thousandth of the compensatory damages awarded against FTB. *See* 1995 Nev. Stat. 1071, 1073.[4] The same Nevada law prohibits punitive damages against Nevada government agencies. Nev. Rev. Stat. §41.035(1). The state trial court, however, among its other errors, declined to apply those limits to FTB. Thus, by the time it added over $2.5 million in costs and $102 million in prejudgment interest to the jury verdict, the trial court entered a total judgment against FTB of over $490 million. Pet.App.11, 72.

FTB appealed the numerous errors made by the trial court. First, it argued that Nevada's discretionary-function immunity statute foreclosed liability given the inherently discretionary conduct underlying its audit of Hyatt's taxes. Second, it contended that Hyatt's state-law claims failed as a

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[4] That cap increased to $75,000 for actions accruing between Oct. 1, 2007 and Oct. 1, 2011, and to $100,000 for actions accruing after the latter date. 2007 Nev. Stat. 3015, 3024-25, 3027.

matter of law. Third, it appealed the trial court's failure to afford California the same immunity that Nevada law grants to a Nevada government entity. Finally, FTB preserved its argument that *Nevada v. Hall* was wrongly decided and should be overruled, and that FTB could not be haled into the Nevada courts absent its consent. *See* J.A.203.

Six years after trial—over sixteen years after Hyatt filed suit—the Nevada Supreme Court finally issued its decision affirming in part and reversing in part. Pet.App.1-73. The court first held that Nevada's discretionary-function immunity statute did not preclude Hyatt's claims because, in its view, discretionary-function immunity categorically "does not apply to intentional and bad-faith tort claims." Pet.App.72. The Nevada Supreme Court then held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, Pet.App.25-38, but it affirmed the jury's verdict finding FTB liable for fraud and intentional infliction of emotional distress, Pet.App.38-41, 46-51.

The court affirmed the fraud verdict based on FTB's initial notice to Hyatt that he was being audited. That notice contained boilerplate statements that, during an audit, a taxpayer should expect "Courteous treatment by FTB employees," "Clear and concise requests for information from the auditor assigned to your case," "Confidential treatment of any personal and financial information that you provide to us," and "Completion of the audit within a reasonable amount of time." Pet.App.5. The Nevada Supreme Court held that a reasonable person could conclude

that these general statements were false representations, FTB knew they were false, FTB intended for Hyatt to rely on them, and Hyatt did in fact rely on them, sustaining damages. Pet.App.38-40.

The court affirmed the jury's finding of liability on the IIED claim despite acknowledging that Hyatt had presented no objectively verifiable medical evidence of emotional distress. Pet.App.46. Instead, the court pointed to evidence that FTB had disclosed Hyatt's name, address, and social security number in its third-party information requests (though the court acknowledged that Hyatt himself had already previously disclosed this information to the public), FTB had revealed to third parties that he was being audited (via those same standard information requests), and one of the auditors assigned to his case allegedly made an isolated remark regarding Hyatt's religion and was "intent on imposing an assessment" against Hyatt. Pet.App.27, 50.

The Nevada Supreme Court refused to apply to FTB the statutory damages cap applicable to Nevada government entities. It conceded that "[m]ost courts" in other States extend to sister States the same immunities the forum State enjoys. Pet.App.44. It nevertheless concluded that Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages," and that the extension of the cap to a California entity did not serve the countervailing interest in protecting Nevada taxpayers. Pet.App.45. Accordingly, it declined to give FTB the benefit of the statutory cap enjoyed by Nevada government entities. Pet.App.62. It did find the FTB immune from punitive

damages "[b]ecause punitive damages would not be available against a Nevada government entity." Pet.App.65. The court thus upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest), and remanded for retrial on emotional distress damages due to evidentiary and jury-instruction errors. Pet.App.72.[5]

SUMMARY OF ARGUMENT

I. When a State is involuntarily haled into the courts of a sister State, it must be accorded at least the same sovereign immunity as the forum State accords itself. In *Hyatt I*, this Court explained that a forum State is not required to apply the sovereign immunity of another State or provide *greater* protection than that enjoyed by arms of the forum State. But the Court cautioned that, while a policy of equal treatment was permissible, principles of full faith and credit and comity prohibit a State from exhibiting a "policy of hostility" by departing from the "contours of [its] own sovereign immunity from suit." 538 U.S. at 499.

The Nevada Supreme Court blatantly transgressed these principles in the decision below when it refused to extend to FTB, a California agency, the *same* sovereign immunity Nevada provides its own agencies. Whereas compensatory damages against a Nevada state entity would be capped at $50,000 to

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[5] Hyatt has also filed a federal lawsuit against FTB board members and other State officials alleging violations of his constitutional rights. *See Hyatt v. Chiang*, No. 14-849, 2015 WL 545993, at *6 (E.D. Cal. Feb. 10, 2015) (dismissing suit as barred by Tax Injunction Act), *appeal docketed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

reflect the sovereign's distinct status and to protect Nevada taxpayers, the Court authorized unlimited compensatory damages against the FTB. That result cannot be reconciled with *Hyatt I* and the principles it reflects. It demonstrates a clear "policy of hostility" toward California by refusing to recognize California's sovereign immunity even to the extent consistent with Nevada law. It palpably fails to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis" by departing from that baseline and relying instead on a one-sided policy interest in compensating Nevada citizens at the expense of California taxpayers. It fails to "sensitively appl[y] principles of comity" by applying neither California nor Nevada law but a wholly different and legislatively-unauthorized third approach. And it reflects the opposite of a "healthy regard for California's sovereign status" by treating a California agency different from a Nevada agency and the same as a non-sovereign.

II. While the decision below is incompatible with *Hyatt I*, both the decision and the broader course of proceedings here demonstrate the more fundamental problems with failing to afford a State sovereign immunity when a private citizen hales it into court in another State. *Nevada v. Hall* is fundamentally inconsistent with the dignity and residual sovereignty of the States and conflicts with the most fundamental precepts of our constitutional system. The Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), but they did not obliterate the residual sovereignty of the States in the process. Before the Framing, Massachusetts could not be haled into the

New York courts by a New York citizen against its will, and nothing in the text or structure of the Constitution purported to change that. Indeed, the notion that a sovereign State enjoys less immunity to suits in sister State courts than in the courts of the newly created federal sovereign gets things backwards. The contrary rule of *Hall* should be overruled so that bedrock constitutional principles can be restored.

The historical record firmly establishes that before the Nation's independence, under the Articles of Confederation, and during and after ratification of the Constitution, it was universally understood that no State could be involuntarily sued in the courts of another State. Debates between proponents and opponents of the Constitution over Article III reflect a shared view that States possessed sovereign immunity in other States' courts. And the reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), underscores the absurdity of suggesting that a populace shocked by the notion of a State being haled into federal court by a citizen of another State would tolerate such suits in the considerably less neutral courts of that citizen's home State. This Court's decisions before *Hall*, furthermore, uniformly reflect the view that States cannot be involuntarily haled into other States' courts. *Hall* not only failed to explain its departure from these cases; it barely addressed them.

Decisions of this Court since *Hall*, moreover, have rejected almost every premise that underlies that decision. *Hall* casually departed from the Framing-era view of sovereign immunity; subsequent cases have consistently relied on that view and extended

sovereign immunity to proceedings against States that were unheard of when the Constitution was ratified. *Hall* refused to infer sovereign immunity from the constitutional structure; subsequent cases have repeatedly treated sovereign immunity as inherent in the constitutional design absent contrary evidence. *Hall* effectively limited sovereign immunity to the metes and bounds of the Eleventh Amendment's text; subsequent cases have treated the Eleventh Amendment as a recognition of broader sovereign immunity principles from which *Chisholm* deviated. *Hall* essentially dismissed the significance of State sovereignty at the Framing; subsequent cases have emphasized the retention of residual sovereignty unless necessarily sacrificed by the constitutional design. In short, every pillar that supported *Hall's* ahistorical and counterintuitive conclusion has been thoroughly undermined by subsequent and better reasoned decisions. There is simply no coherent jurisprudential support remaining to prevent *Hall's* demise.

Hall has also proved unworkable doctrinally and in practice, as this case amply confirms. In place of a bright-line and predictable constitutional rule of sovereign immunity that applies unless waived, *Hall* created a regime in which a State never knows the extent of its sovereign immunity. While a State controls the extent of its waiver of sovereign immunity in its own courts, and this Court's cases provide clear guidance about exposure in federal court, the extent of liability in the courts of sister sovereigns under *Hall* is a guessing game. In an increasingly mobile world, a State could be haled into state court in virtually any State. The contours of sovereign immunity of state

entities in those courts are a product of sovereign judgments wholly outside the control of the foreign/defendant State. And, as this case demonstrates, the foreign/defendant State is at the mercy of the forum State's courts as to whether it even gets the benefit of the sovereign immunity enjoyed by arms of the forum state.

This case also demonstrates the practical danger of allowing one State to be haled into the courts of a sister sovereign against its will. Although subsequently trimmed, the Nevada jury's initial half-a-billion-dollar award dramatically illustrates the dangers to sovereign dignity and fiscal interests inherent in the *Hall* regime. On top of its substantial remaining damages exposure, California has expended untold resources defending this suit, which is now in its seventeenth year. What is more, as the verdict demonstrates, a Nevada jury needs little incentive to side with a Nevada citizen against another State's government, especially when the latter is involved in an inherently sovereign and decidedly unpopular function like tax collection. The Nevada jury is not even constrained by the reality that the award will ultimately be paid by Nevada taxpayers. Rather than protect against that structural risk, the Nevada courts seized on it as a justification for not providing a California entity with the same protection as an arm of Nevada.

No other *stare decisis* consideration militates in favor of preserving *Hall*. It is a constitutional rather than statutory decision; it does not affect primary conduct; and it has created no reliance interests, much less the contractual or property interests that this

Court has emphasized. More to the point, *Hall* represents a fundamental error on an issue that is essential to the basic design of the Constitution and Our Federalism. The States yielded some sovereignty to the new national government, but only what was necessary to the creation of the new federal government. States retained their full sovereign immunity in their own courts and the vast majority of their sovereign immunity even in the newly-created federal courts. That they nonetheless possess no sovereign immunity against private suits in the courts of sister States is an anomaly too extravagant to maintain. *Hall* should be overruled.

ARGUMENT

I. A State May Not Refuse To Extend To Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

A. As *Hyatt I* Recognized, Full Faith and Credit and Comity Principles Require a Baseline of Equal Treatment When States Are Involuntarily Haled Into Sister States' Courts.

1. In *Hyatt I*, this Court held that the Full Faith and Credit Clause did not require Nevada to apply the terms of California's waiver of its own sovereign immunity under California law, which would have fully immunized FTB from Hyatt's claims. Instead, the Court held that Nevada could permissibly choose to provide an arm of California only the less protective terms of Nevada's waiver of its sovereign immunity under Nevada law, which affords state agencies protection from negligence-based torts but not intentional torts. 538 U.S. at 498-99. Thus, the Court

held, Nevada was not required to apply out-of-state law that would afford a sister State *greater* protections than its own law provides.

In reaching this conclusion, the Court relied on the critical premise—advanced by Hyatt himself—that Nevada evinced no hostility to a sister sovereign but sought only to treat California *equal* to itself. Hyatt argued that a State is "require[d]" to "look[] to its own immunity for similar torts in deciding whether to accord immunity to" a sister State. J.A.195. A State's "own immunity" is the "baseline" for determining the immunity owed to a sister State haled into its courts. J.A.186. By according FTB exactly the same sovereign immunity that Nevada law conferred upon a Nevada agency, the Nevada Supreme Court had given "full regard for the fact that California is a sovereign State." J.A.195; *see also* J.A.189 ("We are treating the other sovereign the way we treat ourselves."); p. 7, *supra*.

This Court embraced that equality premise. In holding that Nevada was not required to treat an out-of-state agency better than an in-state agency, the Court was careful to note that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. And it signaled a different result should a State "exhibit[] a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll*, 349 U.S. at 413). But by according equal treatment to in-state and out-of-state government agencies, the Court concluded, the Nevada Supreme Court had "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours

of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

2. The equal-treatment premise urged by Hyatt and accepted by this Court in *Hyatt I* derives from the Full Faith and Credit Clause and principles of comity and equal sovereignty rooted in the constitutional design. As this Court observed more than a century ago, "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith*, 221 U.S. 559, 580 (1911). That principle likewise undergirds the frequently applied constitutional "equal footing" doctrine. *See, e.g., PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (recognizing that "the States in the Union are coequal sovereigns under the Constitution"); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

This principle of equal sovereignty underlies *Hyatt I*'s admonishment that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. The "animating purpose of the full faith and credit command" was to make the States "'integral parts of a single nation.'" *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)). The Full Faith and Credit Clause was designed to "transform[] an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). While *Hyatt I* held that the Full Faith and Credit Clause does not entitle a State to have its own, more favorable sovereign immunity principles apply directly in the

courts of a sister State, refusing to extend a sister sovereign the same immunity enjoyed by the home sovereign offends equal sovereignty principles and the Full Faith and Credit Clause's intent to bind the independent and equal sovereigns together in a workable whole.

Equal sovereignty and equal treatment likewise inform *Hyatt I*'s observation that the Nevada Supreme Court had "sensitively applied principles of comity." The Court so held because the Nevada Supreme Court, by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis," had demonstrated "a healthy regard for California's sovereign status." 538 U.S. at 499. The Court quite naturally recognized that a State's departure from the "contours of [its] own sovereign immunity from suit" when determining the immunities of a sister sovereign would reflect an improper application of principles of comity. Comity principles allow states to honor a defendant State's request to apply its own sovereign immunity law (*i.e.*, what FTB unsuccessfully sought from the Nevada courts in the proceedings resulting in *Hyatt I*), *see, e.g.*, *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 288 (Ill. 1989) (honoring Indiana's "reservation of sovereign immunity"), or to grant the defendant State the protection afforded to arms of the forum State, *see, e.g.*, *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *see generally* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 289-91 (2006). But comity does not allow a State to deny a sister sovereign both the benefits of the sister sovereign's own sovereign immunity and the benefits of an equal-treatment rule. Such treatment

reflects not comity, but the precise "policy of hostility" *Hyatt I* warned against.

B. The Nevada Supreme Court's Decision Violates the Principles of Full Faith and Credit, Comity, and Equal Treatment Recognized in *Hyatt I*.

The Nevada Supreme Court's refusal to accord California the same immunity that Nevada would receive under Nevada law marks a sharp break from the equal-treatment principles recognized in *Hyatt I*. By refusing to apply to FTB the compensatory damages cap that would apply to a Nevada agency, the Nevada Supreme Court did not simply decline to apply California's broader sovereign immunity law. It declined to apply even Nevada's narrower sovereign immunity law, and did so for the worst of reasons—namely, that application of the cap would disadvantage a Nevada plaintiff with no countervailing benefits to Nevada taxpayers. That a state court could embrace such cavalier treatment of a sister sovereign strongly suggests that the equality principles of *Hyatt I* are no substitute for recognizing the sovereign immunity improperly denied in *Nevada v. Hall*. But the decision is plainly incompatible with *Hyatt I* in at least four respects.

First, the decision plainly demonstrates a "'policy of hostility to the public Acts'" of California. *Hyatt I*, 538 U.S. at 499. California law provides FTB absolute immunity, Cal. Gov't Code §860.2, while Nevada law provides its entities a damages cap, Nev. Rev. Stat. §41.035(1). As *Hyatt I* establishes, it is one thing for Nevada to refuse to apply the absolute immunity that California law would give FTB. That is consistent

with equal treatment. But it is altogether different for Nevada to refuse to recognize the immunity granted by California *even to the extent consistent with Nevada law*. That kind of hostility is forbidden by *Hyatt I*.

Second, and relatedly, the Nevada Supreme Court plainly failed to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499. Hyatt himself advocated this principle in *Hyatt I*, *see* pp. 7, 18, *supra*, and the contours of that benchmark here were not difficult to discern. Nevada capped compensatory damages in suits against the sovereign at $50,000. Rather than apply that straightforward cap, the Nevada Supreme Court upheld a damages award 20 times as large on the fraud count and remanded for another trial and the potential imposition of additional damages on the emotional distress count.

Third, the decision below fails to "sensitively appl[y] principles of comity." *Id.* The Nevada Supreme Court applied neither California's sovereign immunity law nor Nevada's sovereign immunity law, but instead a wholly different, non-legislative, and overtly hostile third approach subjecting California to uncapped liability for compensatory damages. Both California and Nevada law reflect deliberate legislative judgments about the extent to which each State's sovereign immunity should be waived. Determining the metes and bounds of the State's sovereign immunity is a core component of sovereignty. *See, e.g.*, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002). While comity may permit either full recognition of the sister sovereign's own waiver or the protection of the forum State's

waiver, providing neither based on an *ad hoc* judgment of the forum state court is a plain affront to both comity and sovereign immunity principles. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011) (noting that "[a] State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984))).[6]

Fourth, the decision below clearly failed to display a "healthy regard for California's sovereign status." *Hyatt I*, 538 U.S. at 499. To the contrary, the decision below reflects an open disdain for California's sovereign status and the kind of protectionist tendencies that are the very antithesis of comity principles. The Nevada Supreme Court recognizes that a partial waiver of immunity allows for some compensation for injured citizens, while the damages cap plays an important role in protecting both sovereign authority and the public fisc. *See, e.g., Cty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (acknowledging that caps "protect taxpayers and public funds from potentially devastating judgments"). Rather than giving the FTB and California's treasury the benefit of a comparable trade-off, the Nevada Supreme Court yielded to the temptation of open protectionism. As the court

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[6] In explaining its decision, the Nevada Supreme Court relied on a single state-court decision, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992)), *see* Pet.App.44-45, but that reliance only underscores its error. In *Faulkner*, the defendant State agency sought application of its own immunity law, rather than the forum State's immunity law. Consistent with *Hyatt I*, Alabama denied that request for especially favorable treatment. Nothing in *Faulkner* supports the denial of equal treatment.

explained, applying the damages cap here would disadvantage a Nevada citizen with no countervailing benefit to the Nevada treasury. Pet.App.45-46. A comparable judgment by the legislative branch—capping damages for Nevada entities but not out-of-state entities—would be a blatant constitutional violation. *See, e.g., Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 889, 894 (1988). The result should be no different when a court imposes the same discrimination through a profoundly misguided comity analysis.

Hyatt's own arguments only confirm the absence of a "healthy regard for California's sovereign status." In the Nevada Supreme Court, Hyatt argued that "limitless compensatory damages [were] necessary as a means to control non-Nevada government actions." Pet.App.42. But while Nevada courts may have an interest in ensuring the compensation of injured Nevadans up to the limits imposed by Nevada, exercising control over non-Nevada government actions is hardly a constitutionally valid objective. In his brief in opposition, Hyatt emphasized that the Nevada court refused to grant FTB the protections given a Nevada agency because California's officials are not "'subject to legislative control, administrative oversight, and public accountability' *in Nevada*." Br. in Opp.15 (emphasis added). Of course not; but California agencies are subject to all those checks *in California*. And if respect for a sister sovereign means anything, it means respecting the governmental processes of the sister State, not dismissing them because they occur in Sacramento rather than in Carson City.

The Nevada Supreme Court's abject failure to apply the comity and equality principles of *Hyatt I* is powerful evidence that those principles are no substitute for correctly deciding the sovereign immunity question addressed in *Hall*. But if States really can be haled into the courts of their sister States without consent, then it is imperative that this Court give the equality principle of *Hyatt I* real teeth. That equality principle cannot give States the predictability and control over their own immunity that sovereign immunity generally provides. But it does ensure that the States' sovereign status is not simply ignored and that they enjoy the benefits of the rules that the forum sovereign has imposed on itself. If enforceable principles of federal law do not guarantee that much, then the rule of *Hall* is not just erroneous, not just ripe for reconsideration, but utterly unsustainable.

II. *Nevada v. Hall* Was Wrongly Decided, And Its Holding That A Sovereign State Can Be Involuntarily Haled Into The Courts Of Another State Should Be Overruled.

In *Nevada v. Hall*, this Court held that the Constitution does not prohibit a sovereign State from being sued in the courts of another State without its consent. *Hall* creates a constitutional anomaly—States protected against suits in their own courts, and even in the newly created federal courts, can nonetheless be haled into the courts of another State against their will. That decision runs contrary to the intent of the Framers, the constitutional structure, pre-*Hall* sovereign immunity decisions, and the subsequent, better reasoned sovereign immunity jurisprudence of this Court. And, as the facts of this

case demonstrate, the suits that *Hall* allows demean the dignity of the States, threaten their treasuries, and disregard their residual sovereignty. The *Hall* regime has proven thoroughly unworkable. In short, *Hall* was wrong the day it was decided, is more obviously wrong in light of subsequent developments, and should be overruled.

A. *Hall* Was a Poorly Reasoned Departure From the Historical Understanding of Interstate Sovereign Immunity and the Court's Prior Decisions.

1. In *Hall*, California residents injured in an automobile collision with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-12. A California jury found the state employee negligent and awarded over a million dollars in damages. *Id.* at 413. This Court granted certiorari and held that constitutional principles of sovereign immunity do not preclude one State from being haled into the courts of another State against its will. *See id.* at 426-27.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably ... was a matter of importance in the early days of independence." *Id.* at 418. It recognized that, at the Framing, one State would have possessed sovereign immunity in the courts of another. *Id.* at 417. And it observed that the debates over ratification of the Constitution, and later Supreme Court decisions, reflected "widespread acceptance of the view that a sovereign state is *never* amenable to suit without its consent." *Id.* at 419-20 & n.20 (emphasis added).

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional issue. In the Court's view, the "need for constitutional protection against" the "contingency" of a state defendant being sued in a court of a sister State was "not discussed" during the constitutional debates, so it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-19.

The Court then held, without further explanation, that nothing in the Constitution provides "any basis, explicit or implicit," for affording sovereign immunity to a State haled into another State's courts against its will. *Id.* at 421. Critically, it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction of Article III and the Eleventh Amendment. *Id.* at 421, 426. And it determined that no "federal rule of law implicit in the Constitution ... requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, a State must simply hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-26.[7]

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[7] The Court also held that the Full Faith and Credit Clause does not require a forum State to apply a defendant State's sovereign immunity law. *See* 440 U.S. at 421-24. The Court reaffirmed that holding in *Hyatt I* but, as noted, did not revisit the question of whether the Constitution generally "confer[s] sovereign immunity on States in the courts of sister States." 538 U.S. at 497-99.

Justice Blackmun dissented, joined by Chief Justice Burger and Justice Rehnquist. Unlike the majority, Justice Blackmun would have held that the Constitution implicitly embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). The dissenters drew a very different conclusion from the absence of more express discussion of this issue during the constitutional debates: The "only reason why this immunity did not receive specific mention" during ratification is that it was "too obvious to deserve mention." *Id.* at 431. Justice Blackmun also pointed to the Eleventh Amendment's swift passage following the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793): "If the Framers were indeed concerned lest the States be haled before the federal courts ... how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J, dissenting). This "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was, in Justice Blackmun's view, "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist also separately dissented, joined by Chief Justice Burger. He explained that the Court's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile ... with express holdings of this Court and the logic of the constitutional plan itself." *Id.* at 432-33 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of

individual States as unconsenting defendants in foreign jurisdictions." *Id.* at 437. Otherwise, they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* The Eleventh Amendment "is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States." *Id.* Justice Rehnquist concluded that the Court's decision "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441.

2. The *Hall* Court's dismissal of the Framing-era consensus, the Eleventh Amendment experience, and previous precedents is difficult to fathom. In light of this trifecta, *Hall* is far from a "'well reasoned'" decision meriting *stare decisis*. *Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009)).

a. The Framing-era consensus on sovereign immunity is clear: Both before independence and under the Articles of Confederation, the original States enjoyed sovereign immunity from suit in each others' courts. This immunity derived not just from "'the common-law immunity from suit traditionally enjoyed by sovereign powers,'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014), but also from the law of nations governing relations between separate sovereigns, *see* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 582 (1994). Immunity under the law of nations "rested on the

theory that all sovereigns were equal and independent and that one sovereign was therefore not obliged to submit to the jurisdiction of another's courts." *Id.* at 583. During the pre-Constitution period, "the states regarded themselves and one another as sovereign states within the meaning of the law of nations, thereby possessing law-of-nations sovereign immunity." *Id.* at 584; *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1574-75 (2002).

Nathan v. Virginia, 1 U.S. (1 Dall.) 77 (1781), is instructive. There, a Pennsylvania citizen brought suit in the Pennsylvania courts in an effort to attach property belonging to the Commonwealth of Virginia. The case "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting), claiming that it was "a violation of the laws of nations," *Nathan*, 1 U.S. at 77. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan constitutes "a decisive rejection of state suability in the courts of other states." Pfander, *supra*, at 587. Other contemporaneous decisions likewise affirmed that one sovereign State could not be compelled to appear in another State's courts. *See, e.g.*, *Moitez v. The South Carolina*, 17 F. Cas. 574 (Adm. 1781) (No. 9697) (Pennsylvania court

dismissing action brought by South Carolinians because attached vessel was owned by "sovereign independent state" of South Carolina). The absence of additional reported cases is a testament to the obviousness of these outcomes: While it would have been tempting for a private citizen to try to redress his grievance with another colony or State in the citizen's own courts, the consensus view that such suits were barred by sovereign immunity deterred such efforts.

b. The consensus that the thirteen original States entered the Union immune from suit in each other's courts is so overwhelming that it can be disregarded only by dismissing its significance (as in *Hall*) or by deeming it superseded by the ratification of the Constitution. After all, if the unquestioned immunity flowed in part from the law of nations, then the partial sacrifice of the colonies' independent sovereignty could have compromised the immunity. But it is clear that ratification did not disturb the States' immunity from involuntary suit in the courts of other States. To the contrary, in debating Article III, the Framers repeatedly recognized that in the new Republic, as before, a State could not be involuntarily haled into another State's courts. Indeed, that was the shared premise for much of the debate concerning Article III.

While there was no obvious reason to think the new Constitution would undermine the States' immunity from suit in their own courts or each others' courts, the question of state sovereign immunity *in the new federal courts* was a central question during the debate over Article III's proposed extension of the "judicial Power" of the United States to cases "between a State and Citizens of another State." U.S. Const. art.

III, §2, cl.1. Antifederalists who assailed this provision premised their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without consent. For example, the Federal Farmer compared Article III's requirement that a State be "oblige[d] ... to answer to an individual in a court of law" with the fact that "the states are now subject to *no such actions*." *Federal Farmer No. 3* (Oct. 10, 1787) in 4 The Founders' Constitution 227 (Philip B. Kurland & Ralph Lerner, eds., Chicago 1987) (emphasis added).[8] Similarly, the Antifederalist Brutus attacked Article III for requiring States to "answer in courts of law at the suit of an individual," noting that "[t]he states are now subject to *no such actions*." Brutus No. 13 (Feb. 21, 1788), in 4 *The Founders' Constitution* 237, 238 (emphasis added).

Ratification proponents offered two conflicting responses to these arguments, but neither camp took issue with the premise that suits by a citizen of one State against a different nonconsenting State were entirely unprecedented. In the first camp were Federalists whose views would be temporarily vindicated in *Chisholm v. Georgia*. They contended that Article III *did* abrogate State sovereign immunity in such suits and viewed the provision of a federal forum for suits that could not otherwise be brought as a virtue. They argued that Article III provided federal-court jurisdiction over suits by individuals

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[8] And while the Federal Farmer criticized the balance of Article III as redundant, he pointedly excepted the suits against state defendants: "Actions in all these cases, *except against a state government*, are now brought and finally determined in the law courts of the states respectively." *Id.* (emphasis added).

against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Edmund Pendleton, *Speech to the Virginia Ratifying Convention* in 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 549 (Jonathan Elliot ed., 1836) (hereinafter *Elliot's Debates*). As another proponent of this view, Edmund Randolph, the Nation's first Attorney General, remarked in his 1790 Report on the Judiciary: "[A]s far as a particular state can be a party defendant, a sister state cannot be her judge." Edmund Randolph, *Report of the Attorney-General to the House of Representatives*, reprinted in 4 The Documentary History of the Supreme Court of the United States, *1789-1800* 130 (Maeva Marcus, ed., Columbia 1992). Significantly, Randolph added that the Constitution does not "narrow this exemption; but *confirms* it." *Id.* (emphasis added).

The second camp consisted of Federalists whose views would ultimately be vindicated in the Eleventh Amendment. They urged that the Antifederalists were misreading Article III, which they read as *not* abrogating State sovereign immunity in suits brought by individuals. But while these leading ratification proponents took issue with the Antifederalist view of what Article III accomplished, they fully embraced the premise that a suit by a private individual against a nonconsenting State was an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part and parcel of the reason that Article III did not authorize them in federal court. Alexander Hamilton wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," an immunity "now enjoyed by the

government of every State in the Union." The Federalist No. 81, at 487 (Clinton Rossiter ed. 1961) (Hamilton). Hamilton added that this immunity would "remain with the States" absent a "surrender of this immunity" in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued, "It is not in the power of individuals to call any state into court." 3 *Elliot's Debates* 533. John Marshall claimed, "It is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555.[9]

In short, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *supra*, at 263. Interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III. *Id.* at 253.

c. This foundational premise was equally manifest in the adoption of the Eleventh Amendment.

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[9] Because these remarks arose in a debate over federal-court jurisdiction, they might conceivably be construed as narrowly addressing only the impossibility of federal-court jurisdiction over suits against nonconsenting States. But with their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns, they "most plausibly included suits in the courts of another state" as well. Woolhandler, *supra*, at 256-57. Moreover, the Framers were well familiar with the *Nathan* case, which recognized States' immunity in other States' courts. Not only was the case well-publicized, but Madison was one of the Virginia delegates who sought the case's dismissal, while Marshall was later appointed to resolve the dispute. *See* Pfander, *supra*, at 586-87; 8 The Papers of James Madison 68 n.1 (Robert A. Rutland et al. eds., 1973).

In *Chisholm v. Georgia*, the Court sided with the first camp of Federalists, including Edmund Randolph (who argued the case for Chisholm), and held that federal-court jurisdiction under Article III did, in fact, extend to suits brought against one State by a citizen of another State. The decision was, to say the least, not popular. As Charles Warren has described it, the decision "fell upon the country with a profound shock." Charles Warren, 1 The Supreme Court in United States History 96 (rev. ed. 1926). While the Eleventh Amendment was the most concrete and enduring response to that decision, it was not the only one. The Massachusetts Legislature, for example, denounced the decision as "repugnant to the first principles of a federal government"; more dramatically, the House of Representatives in Georgia enacted a bill making any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden v. Maine*, 527 U.S. 706, 720-21 (1999). The notion that the Framing generation would condemn suits by private citizens against another State in the neutral federal courts this harshly and universally, but nonetheless tolerate such suits in the home state courts of such a citizen strains all credulity. And the strong affirmations of broad sovereign immunity following *Chisholm* confirm that such immunity was assumed in—and confirmed by—the Eleventh Amendment's passage.

For example, the Connecticut legislature pronounced that "no State can on any Construction of the Constitution be held liable ... to make answer *in any Court*, on the Suit, of any Individual or Individuals whatsoever." *Resolution of the Connecticut General Assembly* (Oct. 29, 1793) in 5

Documentary History of the Supreme Court 609 (emphasis added). The Virginia legislature declared that "a state cannot ... be made a defendant at the suit of any individual or individuals." *Proceedings of the Virginia House of Delegates* (Nov. 28, 1793) in 5 Documentary History of the Supreme Court 338, 339 n.1. The South Carolina Senate stated that "the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence of the respective States." *Proceedings of the South Carolina Senate* (Dec. 17, 1793) in 5 Documentary History of the Supreme Court 610-11. And in a speech to the Massachusetts General Court, John Hancock rejected the notion that "each State should be held liable to answer ... to every individual resident in another State or in a foreign kingdom." *John Hancock's Address to the Massachusetts General Court* (Sept. 18, 1793) in 5 Documentary History of the Supreme Court 416.

As the *Hall* dissenters emphasized, these objectors to *Chisholm*, and indeed all those who sought and obtained the Eleventh Amendment's passage, were not embracing the illogical proposition that Georgia *could not* be sued by Chisholm in *federal* court, but *could* be sued by Chisholm in South Carolina *state* court. "If the Framers were indeed concerned lest the States be haled before the federal courts ... how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). After all, the federal courts were intended to be a neutral forum for interstate disputes. A State would surely *rather* be

tried in that neutral federal forum than before a partisan jury and judge in another State's courts. If the former was repugnant and profoundly shocking, the latter was wholly unthinkable. It would produce confrontations between States wholly incompatible with the basic design of the new Republic. The States that ratified the Eleventh Amendment would not have "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437 (Rehnquist, J., dissenting). To conclude otherwise "makes nonsense of the effort embodied in the Eleventh Amendment." *Id.* at 441.[10]

d. This Court's decisions predating *Hall* uniformly reflect the Framers' view that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers v. Arkansas*, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." 61 U.S. (20 How.) 527, 529 (1857) (emphasis added). In *Cunningham v. Macon & B. R. Co.*, 109 U.S. 446 (1883), the Court was equally clear: "[N]either a state nor the United States can be sued as defendant *in any court in this country* without their consent." *Id.* at 451 (emphasis added); *see also Hans v. Louisiana*, 134 U.S.

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[10] It bears noting that this "nonsense" results under any reading of the Eleventh Amendment. Even under the narrowest view of the Amendment and the federal-court cases it eliminates—a view this Court has repeatedly rejected, *see, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 67-70 (1996)—it makes no sense to conclude that the Eleventh Amendment rendered Georgia immune from suit in this Court, but fully subject to Chisholm's action in South Carolina state court.

1, 16 (1890) (same). And in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts, those proceedings must be dismissed, since the Pennsylvania courts have "no power to bring other States before them." *Id.* at 80.

The States, too, recognized this same general principle. For example, in *Paulus v. South Dakota*, 227 N.W. 52 (1929), the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. It held that "so carefully have the sovereign prerogatives of a state been safeguarded in the Federal Constitution," that "no state could be brought into the courts of the United States at the suit of a citizen of another state." *Id.* at 54-55. It added that involuntarily haling one State into the courts of a sister State would be inconsistent "with any sound conception of sovereignty" *Id.* at 55. Similarly, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to simply entertain suits against sister States in its own courts. Instead, it enacted a statute permitting citizens to assign claims to it, which the State would then pursue in original actions before this Court. *See New Hampshire v. Louisiana*, 108 U.S. 76, 76-77 (1883).[11]

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[11] New Hampshire's attempted original action highlights the connection between such State-versus-State actions and citizen-versus-State actions. The unamended Constitution provided a neutral federal forum for both on the assumption that sovereign immunity precluded any other forum for either type of suit. The Eleventh Amendment eliminated a federal forum for the latter suits and thus foreclosed any forum for such suits. But the notion

Indeed, shortly after *Hall* was decided, state supreme courts expressed surprise at the decision. Barely one year after *Hall*, the New York Court of Appeals remarked that it had been "long thought that a State could not be sued by the citizens of a sister State except in its own courts." *Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise observed, "For the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state to be sued in the courts of another state," based on the theory that "this immunity was an attribute of state sovereignty that was preserved in the Constitution." *Struebin v. State*, 322 N.W.2d 84, 85 (Iowa 1982); *see also Kent Cty. v. Shepherd*, 713 A.2d 290, 297 (Del. 1998) ("For almost two hundred years, it had been assumed that the United States Constitution implicitly prohibited one state from being sued in the courts of another state—just as the Eleventh Amendment explicitly prohibited states from being sued in federal courts.").[12]

3. *Hall* engaged with almost none of the foregoing history or precedent. *See* Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case*

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that a South Carolina citizen could sue Georgia in South Carolina court was, for the Framing generation, equally as absurd as the notion that the State of South Carolina could sue Georgia in South Carolina court.

[12] Before *Hall*, suits against States in sister States' courts were very infrequently maintained, but these "few suits" were predicated on "extant federal-court exceptions to state and federal governmental immunities," not a rejection of the general principle of interstate sovereign immunity. *See* Woolhandler, *supra*, at 276-82.

Study, 70 Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due."). Indeed, to the extent *Hall* addressed the historical record at all, it *conceded* that States could not be involuntarily haled into sister States' courts at the Framing. But the full historical record—which *Hall* ignored—establishes much more than that. It demonstrates the error of *Hall*'s casual premise that interstate sovereign immunity was "apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-19. And it shows that even if the need for express "constitutional protection" against States' being haled into other States' courts "was not discussed" extensively, *id.* at 419, that relative silence reflects the absurdity of a private citizen suit haling a sovereign State into the citizen's home state courts, as well as the obviousness that immunity from such suits was preserved and reinforced by the Constitution. The States' continued immunity from such suits was "too obvious to deserve mention." *Id.* at 431 (Blackmun, J., dissenting).

Furthermore, *Hall* simply declared—without any meaningful analysis—that neither Article III nor the Eleventh Amendment provides "any basis, explicit or implicit," for recognizing a constitutional principle of interstate sovereign immunity. 440 U.S. at 421. But *Hall* was plainly wrong on both counts. The debates over Article III proceeded on the fundamental premise that States could not and would not otherwise be haled into *any court* by a private citizen. And as Edmund Randolph remarked, the Constitution did not "narrow" the Framers' clearly held understanding of interstate sovereign immunity; it "confirm[ed]" it. Moreover, any remaining doubt is erased by the

reaction to *Chisholm* and the Eleventh Amendment. The notion that the Eleventh Amendment simply cleared the way for Chisholm to sue Georgia in the South Carolina courts is risible. When both dissenting opinions in *Hall* emphasized as much, the majority did not even try to muster a response.

Hall also failed to acknowledge, much less explain its departure from, numerous earlier Court decisions reflecting the longstanding premise that States' sovereign immunity protected them from suit in the courts of their sister States. That alone is a basis for rejecting its novel holding. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 232 (1995); *United States v. Dixon*, 509 U.S. 688, 704, 712 (1993). And the only state-court decision regarding interstate sovereign immunity that it discussed was *Paulus*, which *affirmed* the federal constitutional dimension of interstate sovereign immunity. *See Hall*, 440 U.S. at 417 n.13.

In short, *Hall*'s reasoning lacks the "'careful analysis'" that warrants application of *stare decisis*. *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)). Its sudden, spurious rejection of the firmly entrenched principle of interstate sovereign immunity—recognized before the Nation's independence, under the Articles of Confederation, during and following the ratification of the Constitution, and for almost 200 years afterward—was "'unsound in principle,'" *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783 (1992) (quoting *Garcia v. San Antonio Metro. Transit*

Auth., 469 U.S. 528, 546 (1985)), and does not merit this Court's reaffirmation.[13]

B. *Hall* Is Inconsistent With the Court's More Recent and Better Reasoned Sovereign Immunity Jurisprudence.

Hall is not only unpersuasive on its own terms; it also conflicts with this Court's subsequent, and better reasoned, sovereign immunity precedents. Indeed, "[t]he reasoning of the Court's more recent jurisprudence has rejected" almost every rationale on which *Hall* was based, fatally "undermin[ing] [its] doctrinal underpinnings." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (quotation marks omitted); *see also United States v. Gaudin*, 515 U.S. 506, 521 (1995); *South Carolina v. Baker*, 485 U.S. 505, 520 (1988); *United States v. Salvucci*, 448 U.S. 83, 88-89 (1980).

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[13] Several factors may have contributed to *Hall*'s less-than-robust reasoning. First, the California Supreme Court decision resulting in *Hall* rejected the State's claim of sovereign immunity on different grounds from those embraced in *Hall*. That court had relied on since-discarded waiver principles to conclude that Nevada had waived its sovereign immunity in California by "enter[ing] into activities in this state," and thus did not address the scope of the (waived) immunity. *Hall v. Univ. of Nevada*, 503 P.2d 1363, 1364 (Cal. 1972); n.15, *infra*. Second, before this Court, the *Hall* respondents largely advanced that same waiver argument and barely addressed the constitutional issues. *See* Br. of Resp'ts, *Hall*, 1978 WL 206995, at *15-16. The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("[T]ruth ... is best discovered by powerful statements on both sides of the question." (quotation marks omitted)).

To begin with, *Hall* casually dismissed the Framing-era view of interstate sovereign immunity. It acknowledged that the Framers would have viewed the sovereign as immune from suits in other States, but accorded that critical fact no constitutional significance. Subsequent decisions, however, have explained that in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). States enjoy the sovereign immunity that they "enjoyed before the ratification of the Constitution ... except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. And "the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (*FMC*); *see also N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 193 (2006); *Seminole Tribe*, 517 U.S. 44, 70 & n.12 (1996); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 780-82 (1991).

These principles apply with full force here and underscore *Hall*'s error. The historical record clearly demonstrates that States were not subject to involuntary suit in other States' courts either "at the time of the founding or for many years thereafter." *FMC*, 535 U.S. at 755. Before ratification, the States enjoyed sovereign immunity in each others' courts, and nothing in the "plan of the Convention" or subsequent amendments was inconsistent with that

rule; to the contrary, the plan of the Convention and the Eleventh Amendment both confirmed it. *Alden*, 527 U.S. at 713. If an independent nation had purported to open its courts to allow one of its citizens to sue an unconsenting foreign sovereign, it would have violated the law of nations and been a serious affront to the foreign sovereign, prompting diplomatic (if not military) countermeasures. The plan of the convention was to knit the States together into a single Republic in which States treated each other with the dignity befitting co-equal States, but not the diplomacy that dictates relationships between unrelated sovereigns. Preserving the pre-existing immunity of the States from suits in each others' courts avoids serious affronts to each others' sovereignty and guarantees that no sovereign State can be haled into any courts in the United States other than as expressly provided for in the Constitution.

Moreover, the notion that an individual could hale an unconsenting sister State into his home State's courts was indisputably "anomalous and unheard of" at the Framing. *FMC*, 535 U.S. at 755. Indeed, "no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity" they enjoyed in other States' courts. *Alden*, 527 U.S. at 741. To the contrary, proponents *and* opponents of the Constitution shared the contrary premise and disputed only whether such suits could proceed in the newly formed federal courts. And the Eleventh Amendment decisively answered that question and underscored that a private suit against an unconsenting State was an affront to state sovereignty *even if* the suit proceeded in a neutral federal forum. The States' immunity from suit in less

neutral courts of other sovereigns was "a principle so well established that no one conceived it would be altered by the new Constitution." *Id.* In short, history provides "no reason to believe" that the Framers "intended the Constitution to preserve a more restricted immunity" than that widely recognized before—and for almost 200 years after—the Constitution's ratification. *Id.* at 735.

Hall also refused to "infer[]" sovereign immunity "from the structure of our Constitution." 440 U.S. at 426. Subsequent decisions, by contrast, have repeatedly treated sovereign immunity as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford*, 501 U.S. at 779; *see also, e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (*VOPA*); *FMC*, 535 U.S. at 751-53; *Seminole Tribe*, 517 U.S. at 54. These decisions recognize "the structural understanding that States entered the Union with their sovereign immunity intact" and "retained their traditional immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments.'" *VOPA*, 131 S. Ct. at 1637-38 (quoting *Alden*, 527 U.S. at 713). *Hall* applied the opposite presumption. Rather than respecting sovereign immunity unless altered by the plan of the Convention, *Hall* treated sovereign immunity as sacrificed unless expressly preserved by the Constitution.

Relatedly, *Hall* effectively limited sovereign immunity to the words of Article III and the Eleventh Amendment. *See* 440 U.S. at 421, 424-27. Subsequent

decisions, though, have recognized that the Constitution implicitly protects principles of sovereign immunity that go beyond the literal text. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004); *FMC*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-29; *Seminole Tribe*, 517 U.S. at 54; *Blatchford*, 501 U.S. at 779. And, as noted, those decisions observe that the Constitution itself protects that immunity to the extent it is not inconsistent with the plan of the Convention. Thus the absence of express constitutional language speaking directly to interstate sovereign immunity does not, as *Hall* indicated, undermine the proposition that the Constitution shields the States in this regard.

And while the Constitution's text does not expressly mention sovereign immunity for suits like Hyatt's, both Article III and the Eleventh Amendment presume it. Article III's provision of a federal forum for suits between States and between a citizen and another State were both premised on the understanding that in the absence of a federal forum, such disputes could not be resolved through litigation. Rather than allow such disputes to fester, Article III provided a federal forum premised on the inability of such disputes to be litigated in state court against an unconsenting State. *Cf. Chisholm*, 2 U.S. (2 Dall.) at 468 (opinion of Cushing, J.). When the Eleventh Amendment withdrew a federal forum for disputes between citizens and other States, it reinforced that such disputes could not proceed *in any court*, even a neutral federal forum, indeed even in this Court. To construe the Eleventh Amendment as anything other than a recognition that Chisholm could sue Georgia in neither South Carolina court nor a federal court is not

just ahistorical, but absurd. As the *Hall* dissenters observed (without rebuttal), it would be utterly illogical for the States to have swiftly, and indignantly, eliminated a neutral federal forum for hearing such suits against them, but to have intended to leave themselves open to the same suits in the less-impartial forum of another State's courts. *See Hall*, 440 U.S. at 431 (Blackmun, J., dissenting); *id.* at 437 (Rehnquist, J., dissenting).

Finally, *Hall* acknowledged but essentially dismissed the significance of State sovereignty at the Framing. *See* 440 U.S. at 416-17. Later decisions, however, have emphasized the critical role of that sovereignty in upholding sovereign immunity. "Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.'" *Sossamon*, 131 S. Ct. at 1657 (quoting *FMC*, 535 U.S. at 751); *Blatchford*, 501 U.S. at 779. "Immunity from private suits has long been considered 'central to sovereign dignity.'" *Id.* (quoting *Alden*, 527 U.S. at 751); *see also Bay Mills*, 134 S. Ct. at 2039 ("Sovereignty implies immunity from lawsuits."). Sovereign immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Alden*, 527 U.S. at 713. Given the States' indisputable sovereignty at the time of ratification, they continue to enjoy the sovereign immunity accorded to such sovereigns, which includes immunity from suit in other States' courts.[14]

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[14] At the Framing, the States "did surrender a portion of their inherent immunity" by consenting to a small class of suits, like suits brought by sister States in this Court or suits by the federal government in the federal courts. *FMC*, 535 U.S. at 752 (citing

Indeed, following *Hall*, the Court has held that Indian tribes are generally immune from suits by individuals in State courts. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *cf. Bay Mills*, 134 S. Ct. at 2036-39 (reaffirming *Kiowa*). Accordingly, if a State and a tribe are involuntarily haled into a State court—a foreign jurisdiction for either party—the tribe has sovereign immunity, but the State does not. That is so even though tribes arguably possess *less* sovereignty than States. *See Bay Mills*, 134 S. Ct. at 2030-31 (noting the "qualified nature of Indian sovereignty"). It is "strikingly anomalous" that Indian tribes have "broader immunity than the States." *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). Yet that is the unavoidable result of *Hall*'s failure to recognize the significance of State sovereignty at the Framing when evaluating sovereign immunity, in contrast with later decisions of this Court.[15]

Alden, 527 U.S. at 755). But as explained, nothing in the "plan of the Convention" indicates consent to suits by individuals in other States' courts. *Alden*, 527 U.S. at 755.

[15] Notably, the California Supreme Court decision that led to *Hall* has also been overtaken by subsequent precedent. In rejecting Nevada's sovereign immunity in California courts, the California Supreme Court principally relied on *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964), and added that "in a society such as ours ... the doctrine of sovereign immunity must be deemed suspect." *Hall*, 503 P.2d at 1364, 1366; *see also* n.13, *supra*. But this Court has since overruled *Parden*, *see College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999), and has repeatedly rejected the notion that sovereign immunity is a "suspect" doctrine.

In sum, while *Hall* was wrong the day it was decided, subsequent decisions have undermined every pillar on which the decision rested. *Hall* is simply incompatible with both the reasoning and results of this Court's later, sounder sovereign immunity decisions. Embodying "a significant change in, or subsequent development of, our constitutional law" respecting sovereign immunity, *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997), those decisions have established that States possess sovereign immunity from individual suits in federal court, *see Seminole Tribe*, 517 U.S. at 54, 57-60, federal administrative adjudications, *see FMC*, 535 U.S. at 747, and their own courts, *see Alden*, 527 U.S. at 712; and that even Indian tribes are immune from suits in State courts, *see Kiowa*, 523 U.S. at 753.

The notion that a nonconsenting sovereign State is immune from suit in its own courts, is generally immune from suit in a neutral federal forum, but can nonetheless be haled into the potentially hostile courts of another State, is an anomaly too odd to sustain.[16] It is no accident that while the Court failed to reach the issue in its decision, numerous Justices in the *Hyatt I* oral argument rightly called the rule of *Hall* "very odd" (Justice Kennedy), a "tremendous anomaly" (Justice Breyer), and, most colorfully, "totally out of whack with our constitutional structure" (Justice O'Connor). *See* J.A.181, 183, 188. Commentators have likewise noted *Hall*'s incompatibility with subsequent

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[16] The related "removal anomaly" is on full display here: FTB removed this case to federal court, which remanded after Hyatt argued (correctly) that "the Eleventh Amendment forecloses federal district court jurisdiction." J.A.289, 293.

precedent. *See* Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts & The Federal System* 937 n.2 (6th ed. 2009) (noting the "difficulty of reconciling Hall's rationale with that of Alden v Maine"); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037-38 n.110 (2000).[17] Thus while *Hall* was a novel decision when it first appeared, it is now a jurisprudential outlier that can be overruled without threatening other precedents of this Court.

C. *Hall* Is Unworkable in Practice, Demeans States' Dignity, and Creates Interstate Friction.

Hall has also proven both doctrinally and practically "unworkable." *Montejo*, 556 U.S. at 792 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2562-63 (2015); *Seminole Tribe*, 517 U.S. at 63; *Dixon*, 509 U.S. at 712. To begin with, *Hall* replaced the previous "rational jurisdictional structure," which recognized States' sovereign immunity from suit in other States' courts, with a doctrinal morass where "restraints on suits against states in other states' courts now largely depend on the forum state's decisions as to law and comity." Woolhandler, *supra*,

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[17] Hyatt has tepidly suggested that this Court reaffirmed *Hall* in *Alden*. Br. in Opp. 21-22. But *Alden* resolved a different issue and expressly distinguished *Hall* without suggesting that *Hall* was correctly decided. *Alden*'s reasoning, moreover, echoes the *Hall* dissents, is irreconcilable with the *Hall* majority's view of the constitutional structure and Eleventh Amendment, and underscores *Hall*'s incompatibility with a whole host of sovereign immunity decisions that followed it.

at 286. As a result, a State has no way of knowing whether, and to what extent, a particular forum State will confer any immunities upon it in any particular suit. And whatever immunities a State receives at one time says nothing about what immunities it may (or may not) receive on different claims, under different immunity provisions, or when different policies are invoked.

This case provides a perfect example. Here, the *same* Nevada statute both caps compensatory damages and prohibits punitive damages against state agencies. *See* Nev. Rev. Stat. §41.035(1). The Nevada Supreme Court applied the punitive damages prohibition to FTB—because "punitive damages would not be available against a Nevada government entity," Pet.App.65—but *refused* to apply the compensatory damages cap to FTB—because the State's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB" that protection. Pet.App.45. The first explanation, of course, is fully applicable to the compensatory damages cap; and depending on one's justification for punitive damages, the second explanation could apply to the punitive damages prohibition. The Nevada legislature made no distinction between the two, and the California legislature categorically barred suits of this type, but *Hall* leaves the contours of California's sovereign immunity to the policy whims of the Nevada courts. And not just Nevada's courts, because under *Hall*, California can be haled into state courts in 48 other States, each with its own provisions and policies.

This Court also need look no further than this case to appreciate *Hall*'s practical unworkability.

From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—and untold financial and administrative burdens.[18] Once the case finally reached trial, the Nevada jury below was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to over $490 million after costs and interest. Since trial, California has spent another seven years fighting that verdict, and it will face another trial on remand if this Court upholds *Hall*.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation going forward. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB); Complaint, *Satcher v. Cal. Franchise Tax Bd.*, No. 15-2-00390-1 (Wash. Super. Ct. filed June 17, 2015) (alleging fraud by FTB). These suits are highly regrettable yet, given *Hall*, entirely unsurprising. Sovereign governments undertake a number of sovereign responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions generally decline to waive their sovereign immunity over tax disputes. *See* Cal. Gov't Code §860.2; 28 U.S.C. §2860(c). To the extent a sovereign partially waives its sovereign immunity in its own courts, it can rely on the terms of its waiver and the jury's sense that a large

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[18] The trial court docket alone contains almost *three thousand* entries.

verdict against the sovereign will ultimately be footed by members of the jury as taxpayers. But when a Nevada jury knows that California taxpayers will pay the tab, there is no obvious source of restraint, as the jury's verdict here attests. What is more, an increasingly mobile citizenry creates ample opportunities for suits like this one. Indeed, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." David M. Grant, *Moving From Gold to Silver: Becoming a Nevada Resident*, Nev. Law., Jan. 2015, at 22, 25 n.9.

This case thus perfectly encapsulates the dangers of exposing States to unconsented suits in other States. Hyatt's seventeen-year (and counting) suit in the Nevada courts has manifestly demeaned California's "dignity and respect," which sovereign immunity is "designed to protect." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997). And it will almost certainly force California to alter "'the course of [its] public policy and the administration of [its] public affairs'" when it comes to taxation, *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)), even though the "power to ... enforce income tax laws" is an "essential attribute of sovereignty." *Hyatt I*, 538 U.S. at 498. After all, if California can be liable for fraud and intentional infliction of emotional distress for conduct arising out of tax audits, it will naturally scale back its auditing efforts in the future to avoid such liability, particularly for taxpayers who have purported to move to another jurisdiction whose courts will be open to suits against FTB. Moreover,

the constant threat of litigation and the inability to predict whether any particular sister State will confer immunities create an incentive for California to err on the side of underenforcement. In short, *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State when it comes to this core sovereign function. *Alden*, 527 U.S. at 750.

This suit also "threaten[s] the financial integrity of" California. *Id.*; *see also FMC*, 535 U.S. at 765 (observing that "state sovereign immunity serves the important function of shielding state treasuries"). The State has spent untold amounts of taxpayer money defending against Hyatt's suit, and that is before accounting for the damages awarded below and potentially to come. While the Nevada Supreme Court trimmed the trial court's half-*billion* dollar judgment, the prospect of any damages award against California "place[s] unwarranted strain on [its] ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750-51. And damages to the tune of $1 million and counting, which California must pay absent this Court's reversal, necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

In short, this case emphatically illustrates the "severe strains on our system of cooperative federalism" against which the *Hall* dissenters warned. *Hall*, 440 U.S. 429-30 (Blackmun, J., dissenting). If the Framers would have "reprehended the notion of a State's being haled before the courts of a sister State," *id.* at 431, a suit like this one would have left them aghast. This case firmly demonstrates the obvious

flaws of *Hall* and the virtues of applying the sovereign immunity principles this Court has repeatedly recognized both before and after *Hall*.

And while this egregious case has amply "'pointed up [*Hall*'s] shortcomings,'" *Citizens United*, 558 U.S. at 363 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)), those flaws arise in every case in which a nonconsenting State is haled into the courts of a sister State. Recently, for example, *Nevada* was involuntarily haled into the *California* courts against its will. *See* Petition for Writ of Certiorari, *Nevada v. City & Cty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073), *cert. denied*, 135 S. Ct. 2937 (U.S. June 30, 2015). In that case, the plaintiff, a California municipality, has demanded monetary and equitable relief based on Nevada's policy of providing vouchers to indigent medical patients discharged from a State-run facility, who occasionally use them to travel to California. A decision in favor of the plaintiff—or even a settlement—will almost certainly require Nevada to pay out of the public fisc and to alter its State policy, both of which sovereign immunity is designed to prevent. More generally, the spectacle of two States being sued in each other's courts confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would supplant cooperative federalism with a race-to-the-bottom. *See* 440 U.S. at 429-30 (Blackmun, J.).

In his brief in opposition, Hyatt emphasized *Hall*'s belief that the "voluntary doctrine of comity" would prevent States from subjecting sister States to suit. Br. in Opp. 21-22 & n.7. But, as this case demonstrates, vague principles of comity are no

substitute for a simple rule that States are immune from suits in foreign jurisdictions unless and until the state legislature waives that immunity. That bright-line rules places responsibility for the metes and bounds of any waiver of sovereign immunity where it belongs—namely, in the same body that controls the public fisc—rather than in the hands of out-of-state judges wielding doctrines of comity.

D. No Other Interests Warrant *Hall*'s Preservation.

Stare decisis is "at its weakest" when the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235; *see also Seminole Tribe*, 517 U.S. at 63; *Gaudin*, 515 U.S. at 521; *Payne*, 501 U.S. at 828. And it has even further reduced force "'in the case of a procedural rule ... which does not serve as a guide to lawful behavior,'" *Hohn v. United States*, 524 U.S. 236, 251-52 (1998) (quoting *Gaudin*, 515 U.S. at 521); *see also Payne*, 501 U.S. at 828; *Adarand*, 515 U.S. at 234, and where no "serious reliance interests are at stake," *Citizens United*, 558 U.S. at 365; *see also Johnson*, 135 S. Ct. at 2563; *Montejo*, 556 U.S. at 792.

These considerations all militate against preserving *Hall*, a constitutional decision regarding immunity, a matter that "does not alter primary conduct." *Hohn*, 524 U.S. at 252. And *Hall* has engendered no reliance interests, much less those the Court has deemed meaningful in this context. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). No such interests are implicated here; no

parties "have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United*, 558 U.S. at 365. Nor does application of sovereign immunity leave *Hyatt* without a remedy to challenge the underlying tax assessment. To the extent that he would be left without a tort remedy, that is because a sovereign State declined to waive its immunity for such suits. And if Hyatt was relying on a continuing anomaly that allowed a suit in Nevada court that could not proceed in a California court or even in a neutral federal forum after the Eleventh Amendment, then his reliance was plainly unreasonable.

* * *

This case has dragged on for seventeen years, imposing untold costs upon California even before accounting for the damages awarded below. And there is no end in sight unless this Court reaffirms or reestablishes key principles of sovereign immunity. The Court should recognize that *Hall* was incorrect when decided, conflicts with this Court's subsequent precedents, has created an unworkable regime exemplified by this case, and should be overruled.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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September 3, 2015

STATUTORY APPENDIX

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U.S. Const. art. III

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Const. art. IV

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more

States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

SEP - 3 2015

No. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

JOINT APPENDIX

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Petition for Writ of Certiorari Filed March 23, 2015
Petition for Writ of Certiorari Granted June 30, 2015

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IN THE SUPREME COURT
FOR THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

v.

GILBERT P. HYATT,

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/13/2009		Filed Certified Copy of Notice of Appeal/Settlement – SEALED – Notice Re Settlement Conference Program and Suspension of Rules mailed to all counsel. (The requesting of transcripts and briefing are slayed pursuant to NRAP 16(a)(1). Docketing Statement Form mailed to counsel for appellant(s).)
		* * *
03/11/2009	09-06209	Filed Certified Copy of Notice of Cross-Appeal– FILED UNDER SEAL– (Docketing statement mailed to counsel for cross-appellant.)

Date Filed	#	Docket Text
		* * *
04/08/2009	09-08787	Filed Order Granting Motion for Stay without Bond. We grant the motion for stay and direct the clerk of this court to file the reply provisionally received on March 27, 2009.
		* * *
07/20/2009		Received Opening Brief. (FILED PER ORDER 08/07/09).
07/20/2009		Received Appendix to Opening Brief, Vols. 1 through 93. (FILED PER ORDER 08/07/09)
07/20/2009	09-17734	Filed Amicus Brief. Amicus Curiae Brief of the State of Utah (Joined in by the States of Arkansas, Colorado, Delaware, Florida, Idaho, Maine, Maryland, Missouri, Ohio, Oklahoma, North Dakota, Tennessee, Vermont, Virginia and Washington)
		* * *
07/22/2009		Received Amicus Brief. (FILED PER ORDER

Date Filed	#	Docket Text
		08/07/09). Brief of Amicus Curiae Multistate Tax Commission in Support of Appellant/Cross-Respondent Franchise Tax Board of the State of California
		* * *
08/07/2009	09-19313	Filed Order Resolving Motions. We direct the clerk of this court to file the opening brief and appendices received on July 20, 2009. Two motions for association of counsel for purposes of filing amicus curiae briefs have been filed by the Solicitor General for the State of Nevada, one for association of Clark Len Snelson, Esq , for filing an amicus curiae brief on behalf of the state of Utah and 15 other states, and one for association of Bruce J Fort, Esq., for filing an amicus curiae brief on behalf of the Multistate Tax Commission. Having reviewed the motions, we

Date Filed	#	Docket Text
		grant both. The Nevada Solicitor General also filed a motion on behalf of the Multistate Tax Commission requesting leave to file an amicus curiae brief. Then, the Nevada Solicitor General filed a motion to strike the previous motion because the Multistate Tax Commission filed its own motion requesting leave to file an amicus curiae brief. We grant the motion to strike the motion to file an amicus curiae brief filed by the Nevada Solicitor General. We grant the motion by the Multistate Tax Commission to file an amicus curiae brief and deny Hyatt's motions to strike. We direct the clerk of this court to file the amicus curiae brief or the Multistate Tax Commission that was provisionally received on July 22, 2009.

Date Filed	#	Docket Text
08/07/2009	09-17730	Filed Opening Brief. Appellant/Cross-Respondent.
08/07/2009	09-17732	Filed Appendix to Opening Brief. Vols 1 through 93.
08/07/2009	09-17945	Filed Amicus Brief. Brief of Amicus Curiae Multistate Tax Commission in Support of Appellant/Cross Respondent Franchise Tax Board of the State of California.
	* * *	
10/06/2009	09-24437	Filed Appendix. Supplemental Appellant's Appendix.
	* * *	
12/21/2009	09-30822	Filed Appendix to Answering Brief. Volumes 1-101. (Respondent/Cross-Appellant)
	* * *	
01/06/2010		Received Answering Brief. (FILED PER ORDER 01/26/10). Respondent/Cross-Appellant.

Date Filed	#	Docket Text
	* * *	
01/26/2010	10-02103	Filed Order Granting Motion to File Brief with Excess Pages. We direct the clerk of this court to file the Hyatt's proposed brief received on January 6, 2010. We grant Hyatt's motion for permission to file a reply to the opposition to the motion for permission to file a brief with excess pages. We direct the clerk of this court to detach and file the proposed reply attached to Hyatt's motion.
01/26/2010	10-00270	Filed Answering Brief. Respondent/Cross-Appellant.
	* * *	
06/01/2010		Received Reply Brief. Appellant/Cross-Respondent.
06/01/2010	10-14032	Filed Appendix to Reply Brief. Vols. 1 through 48. CD-ROM included. (Appellant/Cross-Respondent).
06/08/2010	10-14617	Filed Supplemental Brief Appellant's Supplemental

Date Filed	#	Docket Text
		Opening Brief Regarding Costs. (Appellant/Cross-Respondent).
06/08/2010	10-14619	Filed Appendix, Appellant's Supplemental Opening Brief Regarding Costs Appendix Vols 1-26 (Appellant/Cross-Respondent)
		* * *
06/11/2010	10-14031	Filed Reply Brief. Appellant/Cross-Respondent.
		* * *
08/13/2010	10-21059	Filed Reply Brief on Cross-Appeal. Respondent's Reply Cross-Appeal Brief.
8/16/2010		Filed Appendix to Reply Brief. Appendix of Exhibits for Respondent's Proposed Sur-Reply Vols 1 through 3 (STRICKEN PER ORDER 10/04/10)
		* * *
09/13/2010	10-23579	Filed Supplemental Brief-Respondent's Supplemental Answering Brief Regarding Costs.

Date Filed	#	Docket Text
09/14/2010	10-23581	Filed Appendix of Exhibits for Respondent's Supplemental Answering Brief Regarding Costs.
	* * *	
10/04/2010	10-25521	Filed Order Denying Motion to File Sur-Reply. We deny the motion for leave to file a sur-reply and direct the clerk of this court to return, unfiled, the proposed sur-reply submitted by Hyatt on August 13, 2010, and to strike the appendix to the sur-reply filed on August 16, 2010.
10/12/2010	10-26724	Filed Appellant's Supplemental Reply Brief Regarding Costs.
	* * *	
02/24/2012	12-05946	Filed Order Setting Oral Argument. We direct the clerk of this court to schedule oral argument on the next available calendar before the full court. Argument shall be one hour.
02/27/2012	12-06127	Issued Notice Scheduling Oral Argument.

Date Filed	#	Docket Text
		Argument is scheduled for Tuesday, April, 3, 2012, @ 10:00 a.m. Argument shall be limited 60 minutes.
		* * *
03/07/2012	12-07339	Filed Order Granting Motion. Oral argument presently scheduled for April 3, 2012, at 10:00 a.m., is hereby vacated. The clerk of this court is directed to schedule this appeal for oral argument before the en banc court on May 7, 2012. Argument shall be limited to 60 minutes.
04/02/2012	12-10235	Issued Notice Scheduling Oral Argument. Oral argument is scheduled for Monday, May 7, 2012, at 1:30 p.m. in Carson City. Argument shall be limited to one hour.
		* * *
05/07/2012		Oral argument held this day Case submitted for decision before the En Banc Court.

Date Filed	#	Docket Text
05/11/2012	12-15172	Filed Order Scheduling Additional Oral Argument. The clerk of this court shall schedule this matter for oral argument on Monday, June 18, 2012, at 10:00 a.m., at the courtroom in Carson City. Argument shall be limited to 60 minutes.
05/14/2012	12-15226	Issued Notice Scheduling Additional Oral Argument. Oral argument is scheduled for Monday, June 18, 2012, at 10:00 a.m. in Carson City. Argument shall be limited to 60 minutes.
		* * *
06/18/2012		Oral argument held this day. Case submitted for decision before the En Banc Court.
		* * *
09/18/2014	14-30944	Filed Authored Opinion "Affirmed in part, reversed in part, and remanded." [The Honorable Nancy M. Saitta, Justice,

Date Filed	#	Docket Text
		voluntarily recused herself from participation in the decision of this matter.] Before the Court En Banc. Author: Hardesty, J. Majority: Hardesty/Gibbons/Pickering/Parraguirre/Douglas/ Cherry. 130 Nev. Adv. Opn. No. 71 EN BANC
		* * *
10/06/2014		Received Appellant's Petition for Rehearing (via E-Flex). (FILED PER ORDER 10/16/2014).
10/07/2014	14-33200	Filed Respondent/Cross-Appellant Gilbert P. Hyatt's Petition for Rehearing.
		* * *
10/07/2014	14-33271	Filed Order Granting Motion for Leave to File Oversized Rehearing Petition and Directing Answers. The clerk of this court is directed to file Franchise Tax Board's rehearing petition which was provisionally received on October 6, 2014. FTB's answer to Gilbert P.

Date Filed	#	Docket Text
		Hyatt's petition for rehearing due: 15 days. Mr. Hyatt's answer to FTB's petition for rehearing due: 15 days.
10/07/2014	14-33272	Filed Petition for Rehearing – Appellant/Cross-Respondent's Petition for Rehearing.
		* * *
10/21/2014	14-35087	Filed Appellant/Cross-Respondent Franchise Tax Board's Answer to Respondent's Petition for Rehearing.
		* * *
10/22/2014		Received Answer to Petition for Rehearing – Respondent Gilbert P. Hyatt's Answer to Appellant Franchise Tax Board of the State of California's Petition for Rehearing. (FILED PER ORDER 10/23/2014)
		* * *
10/23/2014	14-35358	Filed Respondent Gilbert P. Hyatt's Answer to Appellant Franchise Tax

Date Filed	#	Docket Text
		Board of the State of California's Petition for Rehearing.
11/25/2014	14-38932	Filed Order Denying Petitions for Rehearing. "We deny both petitions." NRAP 40(c). [The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.]
12/15/2014	14-40739	Filed Motion to Stay Remittitur Pending Application to U.S. Supreme Court for a Writ of Certiorari, or to Enlarge Time for Issuance of Remittitur.
		* * *
01/02/2015	15-00017	Filed Order Staying Remittitur. We hereby stay issuance of the remittitur until April 22, 2015. If the clerk of this court receives written notice by April 22, 2015, from the clerk of the United States Supreme Court that

Date Filed	#	Docket Text
		appellant/cross-respondent has filed a petition for a writ of certiorari, the stay shall continue in effect until final disposition of the certiorari proceedings. If such notice is not received by April 22, 2015, the remittitur shall issue on April 23, 2015.
01/21/2015	15-02203	Filed Notice from the U.S. Supreme Court extending the time within which to file a petition for writ of certiorari to March 23, 2015.
03/31/2015	15-09679	Filed Notice from US Supreme Court/Certiorari Filed. A petition for a writ of certiorari was filed 3/25/15 and placed on the docket as Case No. 14-1175.
07/07/2015	15-20652	Filed Notice from US Supreme Court. The Petition for Writ of Certiorari is Granted Limited to Question 2 and 3 Presented by the Petition.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
01/06/1998	**Filed Under Seal** *D Complaint Filed* Fee $128.00
02/17/1998	**Filed Under Seal** *D SPECIALLY-APPEARING DEFENDANT FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S NOTICE OF FILING OF PETITION FOR REMOVAL*
06/12/1998	**Filed Under Seal** *D FIRST AMENDED COMPLAINT*

Date Filed	Docket Text
08/13/1998	**Filed Under Seal** *D ANSWER TO FIRST AMENDED COMPLAINT*
04/19/1999	**Filed Under Seal** *PARTIAL JUDGMENT ON THE PLEADINGS*
04/18/2006	**Filed Under Seal** *D SECOND AMENDED COMP*
04/14/2008	**Conversion Case Event Type** *TRIAL BEGINS*
08/06/2008	**Judgment** *VERDICT*
08/06/2008	**Filed Under Seal** *SPECIAL VERDICT FORM*
08/15/2008	**Conversion Case Event Type** *TRIAL ENDS*
09/08/2008	**Judgment** *JUDGMENT PLUS INTEREST*
09/08/2008	**Filed Under Seal** *JUDGMENT*
09/08/2008	**Filed Under Seal** *NOTICE OF ENTRY OF JUDGMENT*

Date Filed	Docket Text
02/03/2009	**Filed Under Seal** *ORDER DENYING 1-FTBS MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY AND CONDITIONALLY MTN FOR NEW TRIAL 2-FTBS ALTERNATIVE MTN FOR NEW TRIAL AND OTHER RELIEF*
02/10/2009	**Filed Under Seal** *NOTICE OF APPEAL (SC 53264)*
05/05/2009	**Notice of Appeal** *Supplemental and/or Amended Notice of Appeal*

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Jury Trial Demanded
Exempt from Arbitration:
Declaratory Relief, Significant Public Policy and Amount in Excess Of $40,000

Filed: January 6, 1998

COMPLAINT

Plaintiff, Gilbert P. Hyatt, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's

function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with the FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in this complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able, through discovery, to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of their employer's or principal's business, whether the employer or principal be FTB or some

other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, *inter alia*, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, and Fifth Causes of Action.

SUMMARY OF CLAIMS

7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.* to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California; (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's residency, domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion, (b) an unreasonable publicity given to private facts,

and (c) casting plaintiff in a false light; and (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and place of abode. The claims specified in this paragraph constitute five separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

PLAINTIFF'S RESIDENCY IN NEVADA

8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time, permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both

his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiff's extensive search, commencing in December 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

THE FTB AND DEFENDANTS' INVESTIGATION OF PLAINTIFF IN NEVADA

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991

(the "1991 Return"). Said return reflects plaintiff's payment of state income taxes to California for income earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous residents of Nevada, including plaintiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12, above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information" which cited the

FTB's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such

information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

ASSESSMENT FOR 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff's California state income tax for the period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the

FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based upon governmental greed arising from the FTB's eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

THE FTB'S CONTINUING PURSUIT OF PLAINTIFF IN NEVADA

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also

be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California]

through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff's California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and

is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has embraced a new theory of liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

THE FTB'S MOTIVE

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the FTB has assessed a fraud

penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

JURISDICTION

26. This court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION
(FOR DECLARATORY RELIEF)

28. Plaintiff realleges and incorporates herein by references each and every allegation contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individual's income subject to California state income tax during such period, the individual must have been either domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

A. Domicile

Domicile is determined by the individual's physical presence in California with intent to stay or if absent temporarily from California an intent to return. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from another state; (8) registering a car in another state; (9)

joining religious, business and/or social organizations in another state; and (10) establishment of a successful business in another state by an individual who is self employed.

B. Temporary or Transitory Purpose

The following contacts which are similar although not identical to those used to determine domicile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another states; (8) obtaining a driver's license from another states; (9) registering a car in another state; (10) joining religious, business, and/or social organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty of 1991 is based upon the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which

contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. Such facts include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991 until April of 1992; (2) plaintiff rented and resided at an apartment in Las Vegas from October 1; (3) plaintiff registered to vote, obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas, commencing in December of 1991; (6) plaintiff's offer to purchase a home in Las Vegas was accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an

extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991 to the present, and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION
(FOR INVASION OF PRIVACY – UNREASONABLE INTRUSION UPON THE SECLUSION OF ANOTHER)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or business interactions,

were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB

concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

THIRD CAUSE OF ACTION
(FOR INVASION OF PRIVACY – UNREASONABLE PUBLICITY GIVEN TO PRIVATE FACTS)

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

42. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties in Nevada certain of plaintiff's personal and confidential information which had been cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts.

43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in

that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FOURTH CAUSE OF ACTION
(FOR INVASION OF PRIVACY – CASTING PLAINTIFF IN FALSE LIGHT)

45. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if set forth herein verbatim.

46. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other

than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

48. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION
(FOR THE TORT OF OUTRAGE)

50. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, above, as if set forth herein verbatim.

51. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State

of California, but without permission from the State of Nevada, and the FTB and defendants' apparent intent to continue to investigate and assess plaintiff's staggeringly high California state income taxes, interest, and penalties for the entire year of 1992 – and possibly continuing into future years – despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

52. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme,

unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages were awarded.

WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26, 1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB has no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

DATED this 6th day of January, 1998.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Jury Trial Demanded
Exempt from Arbitration:
Declaratory Relief, Significant Public Policy and Amount in Excess Of $40,000

Filed: June 12, 1998

FIRST AMENDED COMPLAINT

Plaintiff, Gilbert P. Hyatt, in this First Amended Complaint, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26 1991

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district

office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with the FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in this complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able through discovery to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants" it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of their employer's or principal's business, whether the employer or principal be the FTB or some

other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action.

SUMMARY OF CLAIMS

7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.* to confirm plaintiff's status as Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California (FIRST CAUSE OF ACTION); (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's residency, domicile and place of abode and causing (a) an

unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and place of abode (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (5) recovery of compensatory and punitive damages against the FTB and defendants for fraud (SEVENTH CAUSE OF ACTION); and (6) for compensatory damages against the FTB and defendants for negligent misrepresentation (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

PLAINTIFF'S RESIDENCY IN NEVADA

8. Plaintiff moved to the State of Nevada County of Clark and established full-time residency here on September 26, 1991 and has remained a full-time, permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his

personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991 plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiff's extensive search commencing in early October 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In

sum, plaintiff has substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

THE FTB AND DEFENDANTS' INVESTIGATION OF PLAINTIFF IN NEVADA

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991 (the "1991 Return"). Said return reflects plaintiff's payment of state income taxes to California for income earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous

residents of Nevada, including plaintiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12, above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information" which cited the FTBs authority **under California law** to issue subpoenas and demanded that the recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception

and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

ASSESSMENT FOR 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff's California state income tax for the period of September 26 through December 31 of 1991 in a substantial amount.

Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTBs prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based on governmental greed arising from the FTBs eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay

and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

THE FTB'S CONTINUING PURSUIT OF PLAINTIFF IN NEVADA

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort

"taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the **entire year of 1992**. Specifically, the FTB assessed plaintiff's state income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of

Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff's California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has embraced a new theory of liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

THE FTB'S MOTIVE

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

JURISDICTION

26. This court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION
(FOR DECLARATORY RELIEF)

28. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27 above as though set forth herein verbatim.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individual's income subject to California state income tax during such period, the individual must have been either domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

A. Domicile

Domicile is determined by the individual's physical presence in California **with intent to stay** or if absent temporarily from California an **intent to return**. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location

of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from another state; (8) registering a car in another state; (9) joining religious, business and/or social organizations in another state; and (10) establishment of a successful business in another state by an individual who is self employed.

B. Temporary or Transitory Purpose

The following contacts which are similar although not identical to those used to determine domicile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another states; (8) obtaining a driver's license from another states; (9) registering a car in another state; (10) joining religious, business, and/or social

organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty of 1991 is based upon the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. Such facts include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991 until April of 1992; (2) plaintiff rented and resided at an apartment in Las Vegas from October 1, 1991 until April of 1992; (3) plaintiff registered to vote, and obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas, commencing in December of 1991; (6) plaintiff's offer to purchase a home in Las Vegas was accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991

through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991 to the present, and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION
(FOR INVASION OF PRIVACY – UNREASONABLE INTRUSION UPON THE SECLUSION OF ANOTHER)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31 above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or business interactions, were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to third

parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

THIRD CAUSE OF ACTION
(FOR INVASION OF PRIVACY – UNREASONABLE PUBLICITY GIVEN TO PRIVATE FACTS)

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

42. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties in Nevada certain of plaintiff's personal and confidential information which had been cooperatively

disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts.

43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FOURTH CAUSE OF ACTION
(FOR INVASION OF PRIVACY – CASTING PLAINTIFF IN FALSE LIGHT)

45. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if set forth herein verbatim.

46. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in

California, thereby falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

48. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION
(FOR THE TORT OF OUTRAGE)

50. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, above, as if set forth herein verbatim.

51. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but without permission from the State of Nevada, and the FTB and defendants' apparent intent to continue to investigate and assess plaintiff's staggeringly high California state income taxes, interest, and penalties for the entire year of 1992 – and possibly continuing into future years – despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his

demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

52. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages were awarded.

SIXTH CAUSE OF ACTION
(FOR ABUSE OF PROCESS)

54. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, and 51 and 53, above, as if set forth herein verbatim.

55. Despite plaintiff's ongoing effort, both personally and through his professional

representatives, to reasonably provide the FTB with every form of information it requested in order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada since September 26, 1991, the FTB has willfully sought to extort vast sums of money from plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for which the FTB is empowered to act as an agency of the government of the State of California; said administrative proceedings have been lawlessly and abusively directed into the State of Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized in the attempt to extort money from plaintiff as aforesaid.

56. The FTB, without authorization from any Nevada court or governmental agency, directed facially authoritative **"DEMAND[S] TO FURNISH INFORMATION,"** also referred to herein by plaintiff as "quasi-subpoenas," to various Nevada residents, professionals and businesses *requiring* specific information about plaintiff. The aforesaid "Demands" constituted an actionable abuse of process with respect to plaintiff for the following reasons:

(a) Despite the fact that each such "Demand" was without force of law, they were specifically represented to be "Authorized by California Revenue & Taxation Code Section 19504 (formerly 19254 (a) and 26423 (a)[])," sent out by the State of California Franchise Tax Board on behalf of "The People of the State of California" to each specific recipient, and were prominently identified as relating to "*In the Matter of*: Gilbert Hyatt;" Plaintiff was also identified by his social security number and in certain instances by his

actual home address in violation of express promises of confidentiality by the FTB; although the aforesaid "Demands" were not directed to plaintiff, the perversion of administrative process which they represented was motivated by the intent to make plaintiff both the target and the victim of the illicit documents;

(b) Each such "Demand" was unlawfully used in order to further the effort to extort monies from plaintiff that could not be lawfully and constitutionally assessed and collected because plaintiff was a bona fide resident of Nevada throughout the periods of time the FTB has sought to collect taxes from him, and plaintiff has not generated any California income during any of the pertinent time periods;

(c) Each such "Demand" was submitted to Nevada residents, professionals and businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money to the FTB without factual or constitutional justification, and without the intent or prospect of resolving any legal dispute; indeed, as noted above, many of the "Demands" were used as vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful scheme;

(d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated that they were issued to

secure information (about plaintiff) "for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated," and then proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

(e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands;" and each of the "Demands" or quasi-subpoenas constituted legal or administrative process targeting plaintiff that was not proper in the regular conduct of the FTBs administrative proceedings against plaintiff;

(f) That each "Demand" was selectively, deliberately and calculatingly issued to Nevada recipients who Sheila Cox and the FTB thought would most likely respond to the authoritative nature and language of the documents, as opposed to courteous letters of inquiry that tax auditors and the FTB sent to certain governmental agencies and officials who were viewed as potential sources of criticism or trouble if confronted with the deceptive attempt to exact sensitive information from them through means of facially coercive documents purporting to have extraterritorial effect based upon the authority of California law;

(g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and the personal, investigative forays into Nevada by FTB agents, as detailed above, representative of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel,

Eugene Cowan, Esq., that at this "stage" of the proceedings, these types of disputes involving wealthy or well-known taxpayers over their contested assessments almost always settle because these taxpayers do not want to risk having their personal financial information being made public, thus the "suggestion" by Ms. Jovanovich concerning settlement was made with the implied threat that the FTB would release highly confidential financial information concerning plaintiff if he refused to settle, another deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by plaintiff;

(h) In conjunction with and in addition to the issuance of the aforesaid "Demands" and the other improper methods of exerting coercive pressure on plaintiff to pay the FTB money which it has sought to secure by extortion, and without justification in law or equity, the FTB compounded its abuse of its administrative powers by assessing plaintiff huge penalties based on patently false and frivolous accusations, including but not limited to, the concealment of assets to avoid taxes, plus the outrageous contention that plaintiff was fraudulently claiming Nevada residency;

(i) The FTB and Sheila Cox knew that they had no authority to issue **"DEMAND[S] TO FURNISH INFORMATION"** to any Nevada resident, business or entity, and that it was gross abuse of Section 19504 of the California Revenue and Taxation Code, under which the aforesaid Demands were purportedly authorized that the aforesaid section of the California Revenue and Taxation Code contains no provision that remotely purports to empower or authorize the FTB to

issue such facially coercive documents to residents and citizens of Nevada in Nevada; and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada citizens and businesses into believing that they were under compulsion to respond to the "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB nevertheless deliberately and calculatingly abused the process authorized by the aforesaid section of the California Revenue and Taxation Code in order to promote their attempts to extort money from plaintiff;

(j) From the outset, the determination by Sheila Cox and the FTB to utilize the **"DEMAND[S] TO FURNISH INFORMATION"** in Nevada, constituted a deliberate, unlawful, and despicable decision to embark on a course of concealment in the effort to produce material information, pressure and sources of distortion that would culminate in a combination of sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for money; and the course of concealment consisted of concealing from plaintiff the fact that the aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses, and in hiding from the recipients of the "Demands" the fact that despite their stated support in California law, the documents had no such support and were deceitful and bogus documents; and

(k) The FTB further abused its legal administrative process by issuing the bogus quasi-subpoenas to Nevada residents, professionals, and businesses without providing plaintiff with notice of such discovery as required by the due process clause

of Article 1, Section 8 of the Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

57. As a direct, proximate and foreseeable result of the FTB and defendants' intentional and malicious abuse of the administrative processes, which the FTB initiated and unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress in an amount in excess of $10,000.

58. Plaintiff is informed and reasonably believes, and therefore alleges, that said abuse of the administrative processes initiated and pursued against plaintiff was willful, intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully extort substantial sums of money from plaintiff that could not be remotely justified by any honorable effort within the purview of the powers conferred upon the FTB by the State of California relating to all aspects of taxation, including the powers of investigation, assessment and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

SEVENTH CAUSE OF ACTION
(FOR FRAUD)

59. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, above, as if set forth herein.

60. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and taxpayer of the State of California placed trust and confidence in the bona fides of the FTB as the taxing authority of the State of California when the FTB first contacted him on or about June 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact, plaintiff had become a recognized and prominent force in the computer electronics industry, and he was vitally interested in maintaining both his personal and business security as well as the integrity of his reputation as a highly successful inventor and owner and licensor of significantly valuable patents.

61. During the course of seeking information and documents relating to the 1991 "audit," and repeatedly thereafter, the FTB absolutely promised to maintain in the strictest of confidence, various aspects of plaintiff's circumstances, including, but not limited to, his personal home address and his business and financial transactions and status; and plaintiff's professional representatives took special measures to maintain the confidentiality of plaintiff's affairs including and especially obtaining solemn commitments from FTB agents to maintain in the strictest of confidence (assured by supposedly secure arrangements) all of plaintiff's confidential information and documents; and the said confidential information and documents were given to the FTB in return for its solemn guarantees and assurances of confidentiality as aforesaid.

62. Despite the aforesaid assurances and representations of confidentiality by the FTB, said assurances and representations were false, and the

FTB knew they were false or believed they were false, or were without a sufficient basis for making said assurances and representations Even as the FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his professional representatives, and without notice to either, Sheila Cox and the FTB were in the process of sending the bogus **"DEMAND[S] TO FURNISH INFORMATION"** to the utility companies in Las Vegas which demonstrated that the aforesaid assurances and representations were false, as the FTB revealed plaintiff's personal home address in Las Vegas, thus making this highly sensitive and confidential information essentially available to the world through access to the databases maintained by the utility companies. Specific representative indices of the FTBs fraud include:

(a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase of his Las Vegas residence, and that **"[p]er our discussion, the address of the Las Vegas home has been deleted."** Mr. Cowan ended his letter with the following sentence: **"As we discussed, the enclosed materials are highly confidential and we do appreciate your utmost care in maintaining their confidentiality."** This letter is contained within the files of the FTB, and the FTB noted in its chronological list of items the receipt of the aforesaid escrow instructions with "Address deleted;"

(b) In the FTB's records concerning its Residency Audit 1991 of Gilbert P. Hyatt, the following pertinent excerpts of notations exist:

(i) 2/17/95 – "[Eugene Cowan] wants us to make as few copies as possible, as he is concerned for the privacy of the taxpayer. I [the FTB agent] explained that we will need copies, as the cases often take long time to complete and that cases which go to protest can take several years to resolve[;]

(ii) 2/21/95 – "LETTER FROM REPRESENTATIVE MIKE KERN Earlier document request was transferred to Eugene Cowan due to the sensitive and confidential nature of documentation[;]"

(iii) 2/23/95 – Meeting [between Sheila Cox and] ... Eugene Cowan ... Mr. Cowan stressed that the taxpayer is very worried about his privacy and does not wish to give us copies of anything. I [Sheila Cox] discussed with him our Security and Disclosure policy. He said that the taxpayer is fearful of kidnapping." [sic] This latter reference to "kidnaping" is a fabrication by Sheila Cox in an apparent effort to downplay in the FTBs records, the importance of plaintiff's privacy concerns as those of an eccentric or paranoid; in reality the FTB, Sheila Cox and other FTB agents knew that plaintiff had genuine cause for being concerned about industrial espionage and other risks associated with the magnitude of plaintiff's position in the computer electronics industry;

(iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of the FTB

enclosing copies of various documents. He then stated: "As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access[;]" and

(v) 8/31/95 – In a letter sent to Eugene Cowan, Esq. by Sheila Cox on 8/31/95 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a private person who puts significant effort into protecting his privacy[;]"

(c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr. Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the FTB's stringent Security and Disclosure policy (the violation of which may subject the offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's "understanding that you will retain these materials in locked facilities with limited access" (thereby again underscoring the understanding that all information and documents provided to the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox sent **"DEMAND TO FURNISH INFORMATION"** to the Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas

Valley Water District, providing each such company with the plaintiff's personal home address, thereby demonstrating disdain for plaintiff, his privacy concerns and the FTBs assurances of confidentiality.

63. Plaintiff further alleges that from the very beginning of the FTB's notification to plaintiff and his professional representatives of its intention to audit his 1991 California taxes, express and implied assurances and representations were made to plaintiff through his representatives, that the audit was to be an objective inquiry into the status of his 1991 tax obligation; and that upon information and belief, based on the FTB's subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its agents were determined to share in the highly successful produce of plaintiff's painstaking labor through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by the FTB include:

(a) Despite plaintiff's delivery of copies of documentary evidence of the sale of his California residence on October 1, 1991 to his business associate and confidant, Grace Jeng, to the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore evidence of plaintiff's continued California residency and his attempt to evade California income tax by fraud;

(b) Plaintiff supplied evidence to the FTB that he declared his sale, and income and interest derived from the sale of his LaPalma, California home on his 1991 income tax return, factors that were ignored by the FTB as it concluded that since the grant deed on the home was not recorded until June, 1993 the sale

was a sham, as aforesaid, and a major basis for assessing fraud penalties against plaintiff as a means of building the pressure for extortion;

(c) Plaintiff, aware of his own whereabouts and domicile, alleges that the FTB has no credible evidence, and can indeed provide none, that would indicate that plaintiff continued to own or occupy his former home in La Palma, California which he sold to his business associate and confidant, Grace Jeng on October 1, 1991;

(d) After declaring plaintiff's sale of his California home on October 1, 1991 a "sham," the FTB later declined to compare the much less expensive California home with the home plaintiff purchased in Las Vegas, Nevada (a strong indication favoring Nevada residency) stating that: "Statistics (size, cost, etc.) comparing the taxpayer's La Palma home to his Las Vegas home will not be weighed in the determination [of residency], as the taxpayer **sold the La Palma house on 10/1/91 before he purchased the house in Las Vegas during April of 1992.**" (Emphasis added.); and

(e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses without prior notice to plaintiff, and concerning which a number of such official documents indicated that plaintiff was being investigated from January 1995 to the present, all with the intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the State of California.

64. The FTB and its agents intended to induce plaintiff and his professional representatives to act in reliance on the aforesaid false assurances and representations in order to acquire highly sensitive and confidential information from plaintiff and his professional representatives, and place plaintiff in a position where he would be vulnerable to the FTB's plans to extort large sums of money from him. The FTB was keenly aware of the importance plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards involving the extreme need for security in plaintiff's work and place of residence. The FTB also knew that it would not be able to obtain (at least without the uncertain prospects of judicial intervention) the desired information and documents with which to develop colorable, ostensible tax assessments and penalties against plaintiff, without providing plaintiff and his professional representatives with solemn commitments of secure confidentiality.

65. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and representations by the FTB and its agents, and having no reason to believe that an agency of the State of California would misrepresent its commitments and assurances, did agree both personally and through his authorized professional representatives to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents; in fact, plaintiff relied on the false representations and assurances of the FIB and its agents to his extreme detriment.

66. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents, as aforesaid, resulted in great damage to plaintiff including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress, in total amount in excess of $10,000.

67. The aforesaid misrepresentations by the FTB and its agents were fraudulent, oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

EIGHTH CAUSE OF ACTION
(FOR NEGLIGENT MISREPRESENTATION)

68. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, and 60 through 65, above, as if set forth herein verbatim.

69. The FTB, in providing plaintiff and his professional representatives assurances of strict confidentiality with respect to the sensitive and highly confidential information and documents it sought to obtain from plaintiff concerning, allegedly, its 1991 tax year audit of plaintiff, as detailed above, owed a duty to plaintiff to inform him that the FTB, through its agents, may not have been able to maintain, or otherwise would not maintain, the strict confidentiality it had promised plaintiff in order to

secure confidential information and documentation from him.

70. When the FTB revealed to public sources and third persons the highly sensitive and confidential information and documentation it had promised to retain under conditions of strict confidentiality, it breached its duty to plaintiff as described in paragraph 68, above.

71. The relationship between the FTB and plaintiff, was in every sense one of business and trust, as plaintiff was required to employ professional tax attorneys and accountants in order to deal with the FTB's demands, and the FTB's interest was in determining means and methods whereby it could secure revenue from plaintiff. Although plaintiff was forced to deal with the FTB as matter of law, it was clear that the asserted purpose for the mutual intercourse was a determination as to whether plaintiff may have owed additional taxes for calendar year 1991 for which he had enjoyed the benefits provided to him by the State of California. The negotiations that occurred between plaintiff, through his professional representatives, and the FTB and its agents, over terms under which information and documentation would be made available to the FTB were also part of what must assuredly be viewed as a business relationship.

72. As a direct, proximate and foreseeable result of the FTB's breach of duty to plaintiff, as alleged above, plaintiff has sustained great damage, including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety,

mental and emotional distress in a total amount in excess of $10,000.

WHEREFORE plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26, 1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB has no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SIXTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

EIGHTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For costs of suit;

3. For reasonable attorneys' fees; and

4. For such other and further relief as the Court deems just and proper.

DATED this 11th day of June 1998.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Jury Trial Demanded
Exempt from Arbitration:
Declaratory Relief, Significant Public Policy and Amount in Excess Of $40,000

Filed: February 22, 1999

SECOND AMENDED COMPLAINT

Plaintiff, Gilbert P. Hyatt, in this Second Amended Complaint, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district

office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with the FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in this complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able, through discovery, to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of their employer's or principal's business,

whether the employer or principal be the FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action.

SUMMARY OF CLAIMS

Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.*, to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California (FIRST CAUSE OF ACTION) – *re-pled in this Second Amended Complaint to preserve plaintiff's right to appeal the District Court's April 3, 1999 ruling dismissing this cause of action; this cause of action is therefore no longer at issue in the District*

Court; (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy, including and in particular his informational privacy as well as the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information, resulting from their still ongoing investigation in Nevada of plaintiff's residency, domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their continuing investigation in Nevada of plaintiff's residency, domicile and place of abode, including but not limited to the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (5) recovery of compensatory and punitive damages against the FTB and defendants for fraud, including but not limited to the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information (SEVENTH CAUSE OF ACTION); and (6) recovery of compensatory and punitive damages against the FTB and defendants for breach of

confidentiality in regard to the FTB's breach of its duty not to disclose Hyatt's personal and confidential information (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

PLAINTIFF'S RESIDENCY IN NEVADA

8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time, permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale

of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiff's extensive search, commencing in early October 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

THE FTB AND DEFENDANTS' INVESTIGATION OF PLAINTIFF IN NEVADA

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991 (the "1991 Return"). Said return reflects plaintiff's payment of state income taxes to California for income

earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous residents of Nevada, including plaintiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12, above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information" which cited the FTB's authority under California law to issue subpoenas and demanded that the recipients thereof

produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and

the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

ASSESSMENT FOR 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff's California state income tax for the period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue

of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTBs prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based on governmental greed arising from the FTBs eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

THE FTB'S CONTINUING PURSUIT OF PLAINTIFF IN NEVADA

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices from the FTB

that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff's state income taxes for 1992 in an amount

five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff's California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has

embraced a new theory of liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

THE FTB'S MOTIVE

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and

coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

JURISDICTION

26. This court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION
(FOR DECLARATORY RELIEF)

28. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27 above, as though set forth herein verbatim. *This cause of action is re-pled in this Second Amended Complaint to preserve plaintiff's*

right to appeal the District Court's April 3, 1999 ruling dismissing this cause of action. This cause of action is therefore no longer at issue in the District Court.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individual's income subject to California state income tax during such period, the individual must have been either domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

A. Domicile

Domicile is determined by the individual's physical presence in California with intent to stay or if absent temporarily from California an intent to return. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from another state; (8) registering a car in another state; (9) joining religious, business and/or social organizations in another state; and (10) establishment of a

successful business in another state by an individual who is self employed.

B. Temporary or Transitory Purpose

The following contacts which are similar although not identical to those used to determine domicile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another states; (8) obtaining a driver's license from another states; (9) registering a car in another state; (10) joining religious, business, and/or social organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty of 1991 is based upon the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents

require it to consider. Such facts include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991 until April of 1992; (2) plaintiff rented and resided at an apartment in Las Vegas from October 1, 1991 until April of 1992; (3) plaintiff registered to vote, and obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas, commencing in December of 1991; (6) plaintiff's offer to purchase a home in Las Vegas was accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to

Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991 to the present, and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION
(FOR INVASION OF PRIVACY – UNREASONABLE INTRUSION UPON THE SECLUSION OF ANOTHER, INCLUDING INTRUSION UPON INFORMATIONAL PRIVACY)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 32, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or business interactions, were approached and questioned by the FTB and

defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential, thereby creating a confidential relationship in which the FTB was required not to disclose Hyatt's highly personal and confidential information. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada, and continuing to conduct such an investigation, through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were

performed, and continue to be performed, with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact, and continues to, harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded, and continues to intentionally intrude, into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages

against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

40. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith; according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

41. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him

permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

42. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

43. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

THIRD CAUSE OF ACTION
(FOR INVASION OF PRIVACY – UNREASONABLE PUBLICITY GIVEN TO PRIVATE FACTS, INCLUDING PUBLICITY GIVEN TO MATTERS PROTECTED UNDER THE CONCEPT OF INFORMATIONAL PRIVACY)

44. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 43, above, as though set forth herein verbatim.

45. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods, thereby creating a confidential relationship in which the FTB was required not to disclose Hyatt's highly personal and confidential information. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

46. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties, and continue to disclose to third parties, in Nevada certain of plaintiff's personal and confidential information which had been cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts, or which the FTB had acquired via other means but was required by its own rules and regulations or state law not to disclose to third parties.

47. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

48. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

49. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as

aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

50. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

51. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

FOURTH CAUSE OF ACTION
(FOR INVASION OF PRIVACY – CASTING PLAINTIFF IN A FALSE LIGHT)

53. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 52, above, as if set forth herein verbatim.

54. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

55. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

56. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

57. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

58. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were

expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

59. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

60. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

61. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

FIFTH CAUSE OF ACTION
(FOR THE TORT OF OUTRAGE)

62. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 61, above, as if set forth herein verbatim.

63. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but without permission from the State of Nevada, and the FTB and defendants' clear intent to continue to investigate and assess plaintiff's staggeringly high California state income taxes, interest, and penalties for the entire year of 1992- and possibly continuing into future years- despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and

abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was, and continue to be, to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

64. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

65. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or

punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

66. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

67. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and

right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

68. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

69. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

SIXTH CAUSE OF ACTION
(FOR ABUSE OF PROCESS)

70. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 69, above, as if set forth herein verbatim.

71. Despite plaintiff's ongoing effort, both personally and through his professional representatives, to reasonably provide the FTB with every form of information it requested in order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada since September 26, 1991, the FTB has willfully sought to extort vast sums of money from plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for which the FTB is empowered to act as an agency of the government of the State of California; said administrative proceedings have been lawlessly and abusively directed into the State of Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized in the attempt to extort money from plaintiff as aforesaid.

72. The FTB, without authorization from any Nevada court or governmental agency, directed facially authoritative "DEMAND[S] TO FURNISH INFORMATION," also referred to herein by plaintiff as "quasi-subpoenas," to various Nevada residents, professionals and businesses, requiring specific information about plaintiff. The aforesaid "Demands" constituted an actionable abuse of process with respect to plaintiff for the following reasons:

(a) Despite the fact that each such "Demand" was without force of law, they were specifically

represented to be "Authorized by California Revenue & Taxation Code Section 19504 (formerly 19254 (a) and 26423 (a)[])," sent out by the State of California, Franchise Tax Board on behalf of "The People of the State of California" to each specific recipient, and were prominently identified as relating to "*In the Matter of* Gilbert P. Hyatt;" Plaintiff was also identified by his social security number, and in certain instances by his actual home address in violation of express promises of confidentiality by the FTB; although the aforesaid "Demands" were not directed to plaintiff, the perversion of administrative process which they represented was motivated by the intent to make plaintiff both the target and the victim of the illicit documents;

(b) Each such "Demand" was unlawfully used in order to further the effort to extort monies from plaintiff that could not be lawfully and constitutionally assessed and collected because plaintiff was a bona fide resident of Nevada throughout the periods of time the FTB has sought to collect taxes from him, and plaintiff has not generated any California income during any of the pertinent time periods;

(c) Each such "Demand" was submitted to Nevada residents, professionals and businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money to the FTB without factual or constitutional justification, and without the intent or prospect of resolving any legal dispute; indeed, as noted above, many of the "Demands" were used as vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to the

pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful scheme;

(d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated that they were issued to secure information (about plaintiff) "for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated," and then proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

(e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands;" and each of the "Demands" or quasi-subpoenas constituted legal or administrative process targeting plaintiff that was not proper in the regular conduct of the FTBs administrative proceedings against plaintiff;

(f) That each "Demand" was selectively, deliberately and calculatingly issued to Nevada recipients who Sheila Cox and the FTB thought would most likely respond to the authoritative nature and language of the documents, as opposed to courteous letters of inquiry that tax auditors and the FTB sent to certain governmental agencies and officials who were viewed as potential sources of criticism or trouble if confronted with the deceptive attempt to exact sensitive information from them through means of

facially coercive documents purporting to have extraterritorial effect based upon the authority of California law;

(g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and the personal, investigative forays into Nevada by FTB agents, as detailed above, a representative of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel, Eugene Cowan, Esq., that at this "stage" of the proceedings, these types of disputes involving wealthy or well-known taxpayers over their contested assessments almost always settle because these taxpayers do not want to risk having their personal financial information being made public, thus the "suggestion" by Ms. Jovanovich concerning settlement was made with the implied threat that the FTB would release highly confidential financial information concerning plaintiff if he refused to settle, another deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by plaintiff;

(h) In conjunction with and in addition to the issuance of the aforesaid "Demands" and the other improper methods of exerting coercive pressure on plaintiff to pay the FTB money which it has sought to secure by extortion, and without justification in law or equity, the FTB compounded its abuse of its administrative powers by assessing plaintiff huge penalties based on patently false and frivolous accusations, including but not limited to, the concealment of assets to avoid taxes, plus the outrageous contention that plaintiff was fraudulently claiming Nevada residency;

(i) The FTB and Sheila Cox knew that they had no authority to issue "DEMAND[S] TO FURNISH INFORMATION" to any Nevada resident, business or entity, and that it was gross abuse of Section 19504 of the California Revenue and Taxation Code, under which the aforesaid "Demands" were purportedly authorized; that the aforesaid section of the California Revenue and Taxation Code contains no provision that remotely purports to empower or authorize the FTB to issue such facially coercive documents to residents and citizens of Nevada in Nevada; and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada citizens and businesses into believing that they were under compulsion to respond to the "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB nevertheless deliberately and calculatingly abused the process authorized by the aforesaid section of the California Revenue and Taxation Code in order to promote their attempts to extort money from plaintiff;

(j) From the outset, the determination by Sheila Cox and the FTB to utilize the "DEMAND[S] TO FURNISH INFORMATION" in Nevada, constituted a deliberate, unlawful, and despicable decision to embark on a course of concealment in the effort to produce material information, pressure and sources of distortion that would culminate in a combination of sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for money; and the course of concealment consisted of concealing from plaintiff the fact that the aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses, and in hiding from the recipients of the "Demands" the fact that despite their

stated support in California law, the documents had no such support and were deceitful and bogus documents; and

(k) The FTB further abused its legal, administrative process by issuing the bogus quasi-subpoenas to Nevada residents, professionals, and businesses without providing plaintiff with notice of such discovery as required by the due process clause of Article 1, Section 8 of the Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

73. As a direct, proximate and foreseeable result of the FTB and defendants' intentional and malicious abuse of the administrative processes, which the FTB initiated and unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress in an amount in excess of $10,000.

74. Plaintiff is informed and reasonably believes, and therefore alleges, that said abuse of the administrative processes initiated and pursued against plaintiff was willful, intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully extort substantial sums of money from plaintiff that could not be remotely justified by any honorable effort within the purview of the powers conferred upon the FTB by the State of California relating to all aspects of taxation, including the powers of investigation, assessment and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

75. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

76. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as

aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

77. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

78. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

SEVENTH CAUSE OF ACTION
(FOR FRAUD)

79. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 78, above, as if set forth herein verbatim.

80. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as the taxing authority of the State of California when the FTB first contacted him on or about June 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact, plaintiff had become a recognized and prominent force in the computer electronics industry, and he was vitally interested in maintaining both his personal and business security, as well as the integrity of his reputation as a highly successful inventor and owner and licensor of significantly valuable patents.

81. During the course of seeking information and documents relating to the 1991 "audit," and repeatedly thereafter, the FTB absolutely promised to (i) conduct an unbiased, good faith audit and (ii) maintain in the strictest of confidence, various aspects of plaintiff's circumstances, including, but not limited to, his personal home address and his business and financial transactions and status; and plaintiff's professional representatives took special measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining solemn commitments from FTB agents to maintain in the strictest of confidence (assured by supposedly secure

arrangements) all of plaintiff's confidential information and documents; and the said confidential information and documents were given to the FTB in return for its solemn guarantees and assurances of confidentiality, as aforesaid, thereby creating a confidential relationship in which the FTB was required not to disclose Hyatt's highly personal and confidential information.

82. Despite the aforesaid assurances and representations of (i) an unbiased, good faith audit and (ii) confidentiality by the FTB, said assurances and representations were false, and the FTB knew they were false or believed they were false, or were without a sufficient basis for making said assurances and representations. Even as the FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his professional representatives, and without notice to either, Sheila Cox and the FTB were in the process of sending the bogus "DEMAND[S] TO FURNISH INFORMATION" to the utility companies in Las Vegas which demonstrated that the aforesaid assurances and representations were false, as the FTB revealed plaintiff's personal home address in Las Vegas, thus making this highly sensitive and confidential information essentially available to the world through access to the databases maintained by the utility companies. Specific representative indices of the FTB's fraud include:

(a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan indicated that he was

enclosing a copy of plaintiff's escrow instructions concerning the purchase of his Las Vegas residence, and that "[p]er our discussion, the address of the Las Vegas home has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed, the enclosed materials are highly confidential and we do appreciate your utmost care in maintaining their confidentiality." This letter is contained within the files of the FTB, and the FTB noted in its chronological list of items, the receipt of the aforesaid escrow instructions with "Address deleted;"

(b) In the FTB's records concerning its Residency Audit 1991 of Gilbert P. Hyatt, the following pertinent excerpts of notations exist:

> (i) 2/17/95 – "[Eugene Cowan] wants us to make as few copies as possible, as he is concerned for the privacy of the taxpayer. I [the FTB agent] explained that we will need copies, as the cases often take a long time to complete and that cases which go to protest can take several years to resolve[;]"
>
> (ii) 2/21/95 – "LETTER FROM REPRESENTATIVE MIKE KERN Earlier document request was transferred to Eugene Cowan due to the sensitive and confidential nature of documentation[;]"
>
> (iii) 2/23/95 - "Meeting [between Sheila Cox and] ... Eugene Cowan ... Mr. Cowan stressed that the taxpayer is very worried about his privacy and does not wish to give us copies of anything. I [Sheila Cox] discussed with him our Security and Disclosure policy. He said that the taxpayer is fearful of kidnapping." [sic] This latter reference

to "kidnaping" is a fabrication by Sheila Cox in an apparent effort to downplay in the FTB's records, the importance of plaintiff's privacy concerns as those of an eccentric or paranoid; in reality, the FTB, Sheila Cox and other FTB agents knew that plaintiff had genuine cause for being concerned about industrial espionage and other risks associated with the magnitude of plaintiff's position in the computer electronics industry;

(iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of the FTB enclosing copies of various documents. He then stated: "As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access[;]" and

(v) 8/31/95 – In a letter sent to Eugene Cowan, Esq. by Sheila Cox on 8/31195 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy[;]"

(c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr. Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the FTB's stringent Security and Disclosure policy (the violation of which may subject the offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter to Sheila Cox of February 28, 1995, discussing

the highly confidential nature of "all correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's "understanding that you will retain these materials in locked facilities with limited access" (thereby again underscoring the understanding that all information and documents provided to the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox sent a "DEMAND TO FURNISH INFORMATION" to the Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water District, providing each such company with the plaintiff's personal home address, thereby demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurances of confidentiality.

84. Plaintiff further alleges that from the very beginning of the FTB's notification to plaintiff and his professional representatives of its intention to audit his 1991 California taxes, express and implied assurances and representations were made to plaintiff through his representatives, that the audit was to be an objective, unbiased, and good faith inquiry into the status of his 1991 tax obligation; and that upon information and belief, based on the FTB's subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its agents were determined to share in the highly successful produce of plaintiff's painstaking labor through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by the FTB include:

(a) Despite plaintiff's delivery of copies of documentary evidence of the sale of his California residence on October 1, 1991 to his business associate

and confidant, Grace Jeng, to the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore evidence of plaintiff's continued California residency and his attempt to evade California income tax by fraud;

(b) Plaintiff supplied evidence to the FTB that he declared his sale, and income and interest derived from the sale of his LaPalma, California home on his 1991 income tax return, factors that were ignored by the FTB as it concluded that since the grant deed on the home was not recorded until June, 1993, the sale was a sham, as aforesaid, and a major basis for assessing fraud penalties against plaintiff as a means of building the pressure for extortion;

(c) Plaintiff, aware of his own whereabouts and domicile, alleges that the FTB has no credible evidence, and can indeed provide none, that would indicate that plaintiff continued to own or occupy his former home in La Palma, California which he sold to his business associate and confidant, Grace Jeng on October 1, 1991;

(d) After declaring plaintiff's sale of his California home on October 1, 1991 a "sham," the FTB later declined to compare the much less expensive California home with the home plaintiff purchased in Las Vegas, Nevada (a strong indication favoring Nevada residency) stating that: "Statistics (size, cost, etc.) comparing the taxpayer's La Palma home to his Las Vegas home will not be weighed in the determination [of residency], as the taxpayer sold the La Palma house on 10/1/91 before he purchased the house in Las Vegas during April of 1992." (Emphasis added.); and

(e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses without prior notice to plaintiff, and concerning which a number of such official documents indicated that plaintiff was being investigated from January 1995 to the present, all with the intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the State of California.

84. The FTB and its agents intended to induce plaintiff and his professional representatives to act in reliance on the aforesaid false assurances and representations in order to acquire highly sensitive and confidential information from plaintiff and his professional representatives, and place plaintiff in a position where he would be vulnerable to the FTB's plans to extort large sums of money from him. The FTB was keenly aware of the importance plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards involving the extreme need for security in plaintiff's work and place of residence. The FTB also knew that it would not be able to obtain (at least without the uncertain prospects of judicial intervention) the desired information and documents with which to develop colorable, ostensible tax assessments and penalties against plaintiff, without providing plaintiff and his professional representatives with solemn commitments of secure confidentiality.

85. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and

representations by the FTB and its agents, and having no reason to believe that an agency of the State of California would misrepresent its commitments and assurances, did agree both personally and through his authorized professional representatives to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents; in fact, plaintiff relied on the false representations and assurances of the FTB and its agents to his extreme detriment.

86. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents, as aforesaid, resulted in great damage to plaintiff, including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress, in a total amount in excess of $10,000.

87. The aforesaid misrepresentations by the FTB and its agents were fraudulent, oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

88. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort

money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

89. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

90. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the

imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

91. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

EIGHTH CAUSE OF ACTION
(FOR BREACH OF CONFIDENTIALITY – INCLUDING INFORMATIONAL PRIVACY)

92. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 91, above, as though set forth herein verbatim.

93. As represented in its own manuals and policies, to obtain voluntary compliance by a taxpayer to produce information requested of the taxpayer during audits, the FTB seeks to gain the trust and confidence of the taxpayer by promising

confidentiality and fairness. Moreover, in its position as an auditor, the FTB does gain, both voluntarily and by compulsion if necessary, possession of personal and confidential information concerning the taxpayer that a taxpayer would reasonably expect to be kept confidential and not disclosed to third parties. As a result, a confidential relationship exists between the FTB and the taxpayer during an audit, and continues to exist so long as the FTB maintains possession of the personal and confidential information, that places a duty of loyalty on the FTB to not disclose the highly personal and confidential information it obtains concerning the taxpayer.

94. As described above, in return and in response to the FTB's representations of confidentiality and fairness during the audits, plaintiff did reveal to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audits and investigation into plaintiff's residency during the disputed time periods. The FTB, in its position as an auditor, also acquired personal and confidential information concerning plaintiff via other means. Based on its duty of loyalty and confidentiality in its role as auditor, the FTB was required to act in good faith and with due regard to plaintiff's interests of confidentiality and thereby not disclose to third parties plaintiff's personal and confidential information. The FTB, without necessity or justification, nevertheless breached its duty of loyalty and confidentiality by making disclosures to third parties, and continuing to make disclosures to third parties, of plaintiff's personal and confidential information that the FTB had a duty not to disclose.

95. As a result of such extremely outrageous and oppressive conduct on the part of the FTB, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel upon breach of confidentiality by a party in whom trust and confidence has been imposed based on that party's position.

96. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

97. Plaintiff is informed and believes, and therefore alleges, that said breach of confidentiality by the FTB was intentional, malicious, and oppressive in that such breach constituted despicable conduct by the FTB entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

CLAIM FOR ATTORNEYS' FEES AS SPECIAL DAMAGES PURSUANT TO NRCP 9 (g)

98. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent

and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy and breach of confidentiality, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

99. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

100. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend

himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

101. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26, 1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB has no right or authority to propound or otherwise issue a "Demand to Furnish Information" or

other quasi subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

2. For costs of suit;

3. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

4. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

5. For such other and further relief as the Court deems just and proper.

SIXTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

5. For such other and further relief as the Court deems just and proper.

SEVENTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

5. For such other and further relief as the Court deems just and proper.

EIGHTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

5. For such other and further relief as the Court deems just and proper.

Dated this 18th day of April, 2006.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Filed: May 26, 2006

ANSWER TO SECOND AMENDED COMPLAINT

Defendant Franchise Tax Board of the State of California ("FTB") answers the Second Amended Complaint as follows:

1. In documents filed with the State of California Mr. Hyatt admitted being a long-time California resident. Mr. Hyatt then filed a part-year non-resident income tax return for 1991, representing that he moved to Nevada on October 1, 1991 just before receiving many millions of dollars in income. California has personal state income tax; Nevada does not. FTB conducted an audit of Mr. Hyatt to determine the truthfulness of his representations about if and when he became a non-resident of the State of California, allegedly moving to Nevada. FTB preliminarily concluded that Mr. Hyatt remained a California resident until April 3, 1992, the date Mr.

Hyatt became the owner of a house he purchased in Las Vegas, Nevada and began moving in. Mr. Hyatt disagrees with the results of FTB's audit. A legitimate dispute exists between Mr. Hyatt and FTB concerning when he became a non-resident of the State of California, and the consequences that flow from the resolution of that dispute. The Court has determined that resolution of this dispute is properly made in the State of California and is not a part of this case. FTB, therefore, is without sufficient information or belief on which to base a response to the allegations set forth in Paragraph 1 of the Second Amended Complaint.

2. FTB is the California government agency with responsibility for enforcing California's personal income tax laws and corporate tax laws. FTB is also responsible for administering California's Homeowner and Renter Assistance Program, and other non-tax programs and delinquent debt collection functions, including child support debt collections and delinquent vehicle registration debt collections. In 1999 FTB was also given the additional responsibility of developing and implementing the statewide child support automation project. FTB employs approximately 5000 individuals and processes approximately 20 million tax returns each year. Specific to this case, FTB's statutory duty includes ensuring collection of personal income taxes from California residents and from income earned in California by non-residents. Much like the federal personal income tax system, FTB relies on the voluntary compliance and integrity of taxpayers, and a process of audits to ensure that voluntary compliance and integrity. When Mr. Hyatt filed a personal income tax return for 1991 with FTB, making

representations under penalty or perjury. FTB investigated the truth of those statements. It is that investigation or audit which provides the factual basis for this case

3. Denied.

4. Denied.

5. Denied.

6. Admitted. FTB also demands a trial by jury on all causes of action which may not be dismissed before trial.

7. This lawsuit arises out of an investigation or audit conducted by the FTB of Mr. Hyatt who filed a California personal income tax return representing that he moved from California to Nevada on October 1, 1991. Since FTB's statutory duty includes ensuring proper collection of personal income taxes from California residents and from income earned in California by non-residents, FTB conducted a "residency audit" of Mr. Hyatt. A residency audit is often used to verify the accuracy or truthfulness of a California part-year non-resident tax return. The audit process involves an investigation of whether and when the taxpayer, here Mr. Hyatt, cut his California residential ties and established new, permanent residential ties in the new state, here Nevada. The audit process also looks at the timing of income received during the relevant period. This investigation usually involves an analysis of the taxpayer's continuing California contacts and comparing those contacts with the new state. FTB's audit of Mr. Hyatt was conducted across the years 1993 to 1997. The primary reason the investigation took that amount of time was because Mr. Hyatt

refused to cooperate with FTB and refused to provide information requested by FTB to do its job. As a result, FTB was required to acquire information from third parties who possessed information about Mr. Hyatt's alleged move from California to Nevada and when that move truthfully took place. At the end of its audit, the FTB issued a proposed assessment which concluded that Mr. Hyatt did not become a California non-resident until April 3, 1992, when he purchased a house in Las Vegas, Nevada and began moving in. Mr. Hyatt did not like that proposed assessment. He then filed this lawsuit and filed an appeal in California through California's administrative protest process.

8. The results of FTB's audit of Mr. Hyatt do not confirm these allegations. In connection with its audit, FTB sent Mr. Hyatt a letter and a standard FTB form which requested certain basic information about Mr. Hyatt's residency. Mr. Hyatt hired both an attorney (in California) and a CPA to respond to FTB. Mr. Hyatt's responses to the standard FTB form, and the FTBs attempts to verify their truthfulness raised many questions about if and when Mr. Hyatt really changed his residence from California to Nevada. For instance: (1) Mr. Hyatt began by changing the date that he purportedly moved from California to Nevada; (2) Mr. Hyatt did not provide any moving receipts for his alleged move; (3) Mr. Hyatt's credit card statements provided much evidence of dining or food charges in California from September 1991 through March 1992, but only one dining charge in Nevada during that same timeframe; (4) Mr. Hyatt's daughter believed he still lived in California during the investigated timeframe and as late as 1995 he kept secret room in California with his computers and

business records; (5) Mr. Hyatt did not provide any information about where he was or stayed between September 25, 1991 and October 20, 1991, and when he finally – as part of this case – offered such an explanation, it was only after the documents which would either verify or disprove his story had been destroyed and Mr. Hyatt knew those documents had been destroyed; (6) According to recorded documents in California, Mr. Hyatt owned his California home until 1993 and his California neighbors saw him at that home; (7) The Nevada politicians and several other business contacts provided by Mr. Hyatt, when asked, did not know who Mr. Hyatt was and their records did not verify any relationship with him; (8) While Mr. Hyatt claimed to rent a low-income apartment in Las Vegas in late 1991 and early 1992, the rental managers at that apartment complex never saw him there and he paid his rent with post-dated check mailed from California; (9) The Nevada DMV reported to FTB that it had no record of Mr. Hyatt applying for a Nevada's driver's license, etc. Many other circumstances cast considerable doubt on the truthfulness of Mr. Hyatt's claim that he became a California non-resident in September 1991. In addition, it seemed that Mr. Hyatt was trying to create the appearance – but not the reality – of living in Nevada from September 1991 to April 1992 by registering to vote – a registration that later proved to be false – even though no election was being held in 1991, and signing up for religious organization, even though he did not attend services.

9. Denied.

10. FTB admits that Mr. Hyatt filed a part-year personal income tax return with the State of California for the tax year 1991, but FTB denies each and every remaining allegation set forth in paragraph 10. Because FTB had the duty under California law to investigate Mr. Hyatt's change of residency, FTB begun its audit. The lead auditor assigned to Mr. Hyatt's audit, Sheila Cox, attempted to verify the information provided by Mr. Hyatt concerning his move date, but was unable to completely do so. After conducting some investigation, Ms .Cox sent Mr. Hyatt a position letter encouraging him to provide additional information if her initial conclusions seemed incorrect. Some additional information was provided by Mr. Hyatt. Ms. Cox then proceeded to independently verify the information given to her by Mr. Hyatt. As part of this process, FTB sent letters and made phone calls and visits to third parties, mostly to third parties identified by Mr. Hyatt as allegedly possessing information about Mr. Hyatt's residence. These contacts all occurred between July 15, 1993 and September 27, 1995. Through many of the third parties, Mr. Hyatt learned of these contacts and the information that was being given by FTB to these third parties. Mr. Hyatt did not object to those third party contacts at that time. Only after he learned of FTB's proposed assessments did Mr. Hyatt allege that such contacts "invaded his privacy" or were otherwise wrongful – even though they were not.

11. FTB admits that on June 1993, it opened an audit concerning Mr. Hyatt's 1991 personal income tax return and that thereafter, it reviewed the facts and circumstances concerning Mr. Hyatt's residence and source of his income. The audit included contacts

of government agencies, individuals, and entities by auditors in both California and Nevada for the purpose of determining the correct tax. FTB denies each and every remaining allegation set forth in paragraph 11.

12. FTB admits that in accordance with FTB policies and procedures, its auditors planned and conducted trips to Nevada to review the facts and circumstances relating to Mr. Hyatt's residency, including verification of Mr. Hyatt's representations concerning his Nevada contacts and also a review which included government agencies, individuals and entities in California. In March 1995, Ms. Cox traveled to Las Vegas, Nevada with another auditor. They spent partial days trying to confirm Mr. Hyatt's claim about his change of residency. They went to a local library to look for articles about Mr. Hyatt in local newspapers. They went to the location of Mr. Hyatt's post office box to see if he received mail there. They drove to the neighborhood where Mr. Hyatt allegedly lived and looked at the Tara Avenue house that he bought in April 1992, which even then appeared to them to be vacant and had minimal landscaping. During their visit to the neighborhood, the auditors asked a mail carrier that came by, without identifying Mr. Hyatt, whether she delivered mail on Tara Avenue (she said yes but could not provide any information). On their neighborhood visits, Ms. Cox saw a package on the house's front porch and walked up to the porch, and without touching it, looked at the mailing address that was clearly visible (it was not addressed to Mr. Hyatt). On the same visit, the auditors noticed several construction workers at a site across from the house

on Tara Avenue and asked, without identifying Mr. Hyatt, if they had been working there long (they had just started working there). On their neighborhood visit, the neighborhood trash man came by, and the auditors asked, without identifying Mr. Hyatt, how much trash came from the house (answer: not much). During the neighborhood visits, the auditors also talked to a total of five people in surrounding homes, without ever identifying Mr. Hyatt, to see if they had seen anyone living at the house. The auditors also visited a local real estate office and asked the manager if the home where Mr. Hyatt claimed to live had been listed for sale recently. The rest of that field visit involved visits to the Las Vegas apartment complex where Mr. Hyatt claimed to have once lived, a Sam's Club membership store, and the office of Mr. Hyatt's accountant, which Mr. Hyatt claimed was one of his Nevada business addresses. At the apartment, the auditors spent approximately one hour looking at the apartment complex, asking the managers about their memory of Mr. Hyatt, asking one woman who lived just across from Mr. Hyatt's rented unit if she remembered him, and reviewing the items in Mr. Hyatt's rental file (including Mr. Hyatt's envelope with a Nevada return address and California postmark). At the Sam's Club, the auditors met with the manager to determine if he could provide any membership information without identifying Mr. Hyatt (the manager provided store numbers but could not provide any third party information). At the office of Mr. Hyatt's accountant, the auditors asked the receptionist if Mr. Hyatt's accountant or Mr. Hyatt himself was there. The receptionist indicated that the accountant was not present and that she did not know

who Mr. Hyatt was. Finally, during late November 1995, Ms. Cox accompanied another FTB auditor to Las Vegas to assist on the other auditor's cases. During this visit, because the other auditor's case work was in the vicinity of Mr. Hyatt's alleged residence on Tara Avenue, Ms. Cox made a brief observation of the Tara Avenue residence. She made no inquiries with other persons during this trip concerning the residency of Mr. Hyatt.

13. FTB admits that it sent requests for information to government agencies, individuals and entities in California and Nevada, including requests made on FTB Form 4973-39 pursuant to California Revenue and Tax Code Section 19504. The Second Amended Complaint allegations relating to FTB's right and authority to request information with FTB Form 4973 have been dismissed by the Court, so no answer is required to any allegations concerning FTB's use of that form. FTB denies each and every remaining allegation set forth in paragraph 13.

14. The Second Amended Complaint allegations relating to FTB's right and authority to request information with FTB Form 4973 have been dismissed by the Court, so no answer is required to any allegations concerning FTB's use of that form. FTB denies each and every remaining allegation set forth in paragraph 14.

15. FTB admits that after it completed its audit of Mr. Hyatt's 1991 tax return it issued a Notice of Proposed Assessment, that its review determined that Mr Hyatt severed his residential ties with California on April 3, 1992, and that additional income tax and a

fraud penalty were proposed. FTB denies each and every remaining allegation set forth in paragraph 15.

16. FTB admits that after it completed its audit of Mr. Hyatt's 1991 tax return it issued a Notice of Proposed Assessment that, its review determined that Mr. Hyatt severed his residential ties with California on April 3, 1992, and that additional income tax and fraud penalty were proposed. FTB did so after giving Mr. Hyatt every conceivable opportunity to provide all evidence and information to it concerning his alleged change in residency. FTB denies each and every remaining allegation set forth in paragraph 16.

17. Denied. The Court has already decided that determining the date of, and the consequence of, Mr. Hyatt's alleged change in residency should be and is being made in the State of California.

18. FTB admits that on or about April 1, 1996, Mr. Hyatt received a letter from the FTB notifying Mr. Hyatt of the FTB's proposed determination into the examination of Mr. Hyatt's residency status for 1992 and proposing additional income tax and fraud penalty. FTB denies each and every remaining allegation set forth in paragraph 18.

19. FTB admits that on or about April 10, 1997, Mr. Hyatt received a letter from the FTB notifying Mr. Hyatt of changes in the proposed assessment for the 1992 tax year as result of the review process, providing revised schedules to the tentative determination and informing Mr. Hyatt that once the case was closed, Mr. Hyatt would receive the Notice of Proposed Assessment. On August 14, 1997, Mr. Hyatt was sent a Notice of Proposed Assessment from FTB proposing assessment of additional income tax and penalty. The

proposed assessments were based on Mr. Hyatt's 1992 income, which was substantial. The determination of the amount received before April 3, 1992 could not be made due to Mr. Hyatt's failure to provide documentation substantiating the timing of receipt of his income. FTB denies each and every remaining allegation set forth in paragraph 19.

20. Denied.

21. FTB admits that on or about August 14, 1997, Mr. Hyatt received a Notice of Proposed Assessment from FTB for 1992 proposing assessment of additional income tax and penalty. The proposed tax was calculated based on Mr. Hyatt's 1992 income. The amount received prior to April 3, 1992 could not be determined due to Mr. Hyatt's failure to provide documentation substantiating the time of receipt of his income. FTB denies each and every remaining allegation set forth in paragraph 21.

22. Denied.

23. FTB admits that the proposed assessments for 1991 and 1992 are still under review by the FTB as result of Mr. Hyatt's appeal or protest of the FTB's proposed determinations and because Mr Hyatt has refused to provide relevant information and documentation requested by the FTB necessary to calculate the correct tax. FTB denies each and every remaining allegation set forth in paragraph 23.

24. Denied.

25. Denied.

26. FTB admits that Nevada's courts have personal jurisdiction over FTB in this action, but not

subject matter jurisdiction. FTB denies each and every remaining allegation set forth in paragraph 26.

27. Denied.

FIRST CAUSE OF ACTION

28. The Court has dismissed Mr. Hyatt's First Cause of Action, so no answer is required to the allegations set forth in Complaint paragraphs 28 through 32.

29. The Court has dismissed Mr. Hyatt's First Cause of Action, so no answer is required to the allegations set forth in Complaint paragraphs 28 through 32.

30. The Court has dismissed Mr. Hyatt's First Cause of Action, so no answer is required to the allegations set forth in Complaint paragraphs 28 through 32.

31. The Court has dismissed Mr. Hyatt's First Cause of Action, so no answer is required to the allegations set forth in Complaint paragraphs 28 through 32.

32. The Court has dismissed Mr. Hyatt's First Cause of Action, so no answer is required to the allegations set forth in Complaint paragraphs 28 through 32.

SECOND CAUSE OF ACTION

33. FTB reasserts its same responses to paragraphs 1 through 32.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

THIRD CAUSE OF ACTION

44. The FTB reasserts its same responses to paragraphs 1 through 43.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

FORTH CAUSE OF ACTION

53. The FTB reasserts its same responses to paragraphs 1 through 52.

54. The Second Amended Complaint allegations relating to the FTB's right and authority to request information with FTB Form 4973-39 pursuant to California Revenue and Tax Code Section 19504 or otherwise, have been dismissed by the Court, so no answer is required to the allegations concerning use of the Demand to Furnish Information form and FTB denies each and every remaining allegation.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

FIFTH CAUSE OF ACTION

62. The FTB reasserts its same responses to paragraphs 1 through 61.

63. The Second Amended Complaint allegations relating to the FTB's right and authority to request information with FTB Form 4973-39 pursuant to California Revenue and Tax Code Section 19504 or otherwise, have been dismissed by the Court, so no answer is required to the allegations concerning use of the Demand to Furnish Information form and FTB denies each and every remaining allegation.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

SIXTH CAUSE OF ACTION

70. The FTB reasserts its same responses to paragraphs 1 through 69.

71. Denied.

72. The Second Amended Complaint allegations relating to the FTB's right and authority to request information with FTB Form 4973-39 pursuant to California Revenue and Tax Code Section 19504 or otherwise, have been dismissed by the Court, so no answer is required to the allegations concerning use of the Demand to Furnish Information form. The information included on the form was reasonably necessary at the time to identify Mr. Hyatt in order to gather information relevant to the determination of the correct tax and FTB denies each and every remaining allegation.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

SEVENTH CAUSE OF ACTION

79. FTB reasserts its same responses to paragraphs 1 through 78.

80. Mr. Hyatt did not pay California income tax from the early 1970's until 1991 when he began receiving income from what was commonly referred to as the '516 patent." By mid-1993, Mr. Hyatt was known in the electronics industry as a "submariner," that is, one who files numerous, vague patent applications which are then left pending for many years waiting like a submarine under the water for technology to develop and then surfaces to assert claims to the later developed or conceived technology

arguing that it is described in their earlier-filed specification. Through the '516 patent, Mr. Hyatt contended that he was the "inventor of the microchip processor." However, an interference action by Gary Boone of Texas instruments proved that Mr. Boone was the true inventor of the claimed technology, not Mr. Hyatt. Prior to the final decision in that case, Mr. Hyatt was able to negotiate settlement agreements with numerous companies based on his representation of ownership of the microchip processor technology. Before it was proven that Mr. Hyatt was not the inventor of the microchip processor, some companies agreed to pay him money to avoid litigation and to use the '516 patent assuming he was the rightful owner of the patent. FTB denies each and every remaining allegation set forth in paragraph 80.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

91. Denied.

EIGHTH CAUSE OF ACTION

92. FTB reasserts its same responses to paragraphs 1 through 91.

93. Denied.

94. Denied.

95. Denied.

96. Denied.

97. Denied.

98. Denied.

99. Denied.

100. Denied.

101. Denied.

102. Except as specifically admitted, denied or alleged above, FTB denies each and every remaining allegation of the Second Amended Complaint.

AFFIRMATIVE DEFENSES

1. A bonafide dispute exists between Mr. Hyatt and FTB concerning Mr. Hyatt's residency and the source of his income. That dispute is being resolved in the State of California as the proper forum.

2. All actions taken by FTB concerning Mr. Hyatt were lawful, justified, and privileged.

3. No contract or confidential relationship existed between Mr. Hyatt and FTB.

4. Mr. Hyatt had no reasonable expectation of privacy in the information utilized by FTB to third parties in its audit of Mr. Hyatt.

5. The information utilized by FTB of and concerning Mr. Hyatt was already a matter of public record or already found in the public realm at the time of its utilization.

6. FTB's litigation roster concerns matters of public interest and/or public concern, and contains true information.

7. Mr. Hyatt is a public figure.

8. Mr. Hyatt failed to exhaust his administrative remedies.

9. Mr. Hyatt had failed to state a claim upon which relief can be granted.

10. Mr. Hyatt's claims are barred by the statues of limitation and frauds, and the doctrines of waiver, estoppel, laches, assumption of risk and res judicata.

11. Mr. Hyatt's claims were not plead with particularity as required by NRCP 9(b).

12. Mr. Hyatt's damages, if any were sustained, were caused by either his own actions or by third parties for whom FTB is not responsible or by his own failure to mitigate.

13. Mr. Hyatt's claims are barred because of California's sovereign immunity from suit and the full faith and credit and comity that immunity enjoys.

14. FTB's actions taken as quasi-judicial officials are immune from suit.

15. Mr. Hyatt's claims are beyond the subject matter jurisdiction of Nevada's courts.

16. Mr. Hyatt's claims are barred by U.S.C. §7421(a) which provides: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person against whom such tax was assessed."

17. A statutory remedy in California, which has not been pled or asserted by Mr. Hyatt, may exist for the harms Mr. Hyatt claims he sustained, if he really did sustain any harm.

18. Mr. Hyatt's claims for punitive damages are barred by NRS Chapter 42, Nevada's Constitution and the U.S. Constitution.

19. To the extent additional affirmative defenses are discovered, FTB reserves the right to amend this answer.

* * *

WHEREFORE, judgment should be entered in FTB's favor and against Mr. Hyatt as follows:

1. FTB respectfully requests that Mr. Hyatt take nothing by way of his Second Amended Complaint;

2. For an award of reasonable attorneys' fees and costs incurred in the defense of this action; and

3. For such other and further relief as this Court or the jury deems just and proper.

Dated this 26th day of May, 2006.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 35559 & 36390

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE,
Respondents,

and

GILBERT P. HYATT,
Real Party in Interest.

Filed: April 4, 2002

ORDER GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client, work product or

deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motion for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We

further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition[1] in Docket No. 35549 with respect to FTB NO. 07381, and deny the petition with respect to all the other documents.

BACKGROUND

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt – a long-time California resident who moved to Clark County, Nevada – to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting

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[1] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California Law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an amicus curiae brief in support of Franchise Tax Board's comity argument.

PROPRIETY OF WRIT RELIEF

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,[2] or to control discretion exercised arbitrarily or capriciously,[3] or to arrest proceedings that exceed the court's jurisdiction.[4] An extraordinary

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[2] NRS 34.160 (mandamus).

[3] *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

[4] NRS 34.320 (prohibition).

writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[5]

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.[6] A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.[7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.[8]

DOCKET NO. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.[9] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.[10] California has expressly

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[5] NRS 34.170; NRS. 34.330.

[6] Wardleigh, 111 Nev. at 350-51, 891 P.2d at 1183-84.

[7] *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).

[8] *Id.*

[9] NRS 41.031; Cal Const. Art. 3, § 5; Cal. Gov't Code § 820.

[10] *See* NRS 41.032(2); *Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); *State, Dep't Hum. Res. v. Jimenez*, 113

provided its state taxation agency, Franchise Tax Board, with complete immunity.[11] The fundamental question presented is which state's law applies, or should apply.

JURISDICTION

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.[12] Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.[13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction,[14] while Nevada law is presumed to govern with respect to the underlying torts.[15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court

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Nev. 356, 364, 935 P.2d 274, 278 (1997); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

[11] *See* Cal. Gov't Code §860.2; *Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

[12] *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979).

[13] *Id.* at 421-24.

[14] *Id.* at 414-21.

[15] *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

had jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

COMITY

The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.[16] In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.[17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

NEGLIGENT ACTS

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.[18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation is generally considered to be a

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[16] *Nevada v. Hall*, 440 U.S. at 424-27; *Mianecki v. District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[17] *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

[18] Cal. Gov't Code §860.2; *see Mitchell*, 228 Cal. Rptr. At 752.

discretionary function,[19] and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.[20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

INTENTIONAL TORTS

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.[21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

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[19] *Foster*, 114 Nev. At 941-43, 964 P.2d at 792.

[20] NRS 41.032(2).

[21] *See Mianecki*, 99 Nev. At 98, 658 P.2d at 425.

DOCKET NO. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.[22] And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.[23]

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,[24] or (2) that the communications between Ms. Jovanovich and

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[22] *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

[23] *See In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

[24] *See Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981); *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); *Texaco Puerto Rico v. Department of Consumer Aff.*, 60 F.3d 867, 884 (1st Cir. 1995).

other Franchise Tax Board employees were kept confidential within the agency.[25]

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is protected by the attorney work-product privilege.[26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.[27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

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[25] *See Coastal States*, 617 F.2d at 862-64.

[26] *See Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188.

[27] *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

CONCLUSION

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceed its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

We vacate our stay of the district court proceedings.

It is so ORDERED.[28]

s/Maupin, C.J.
Maupin

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[28] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

s/Young, J.	s/Shearing, J.
Young	Shearing
s/Agosti, J.	s/Leavitt, J.
Agosti	Leavitt

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In *Mianecki v. District Court*,[1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be

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[1] 99 Nev. 93, 98, 658 P.2d 422, 424-35 (1983) (internal citations omitted).

> accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.[2]

s/Rose, J.
Rose

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[2] *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

No. 02-42

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT, ET AL.

On Writ of Certiorari to the Supreme Court of Nevada

ORAL ARGUMENT TRANSCRIPT EXCERPTS

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

FELIX LEATHERWOOD, ESQ.,
Deputy Attorney General
Los Angeles, California; on behalf of the Petitioner.

H. BARTOW FARR, III, ESQ.,
Los Angeles, California; on behalf of Respondent

February 24, 2003

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[4] QUESTION: Mr. Leatherwood, may I ask you a threshold question? Some of your friends in this case have invited an overruling of Nevada against Hall. Of course, California was favored by that decision. Do you join in the plea to overrule Nevada v. Hall, or do you say this case is different because it involves core sovereign functions?

MR. LEATHERWOOD: Justice Ginsberg, we do not join in the chorus to overrule Nevada v. Hall. This case is different. This case goes to footnote 24 of Nevada v. Hall. It's our feeling that Nevada v. Hall is good law in the sense that it does – it does not implicate another state managing another state's core sovereign function. It's – Nevada v. Hall was strictly an automobile accident.

* * *

[12] QUESTION: It doesn't matter. I mean, we're trying to get the – we're trying to get the analysis of it, and I'm having exactly the same problem. Imagine that there, California did say there is absolute immunity, even if you beat somebody up, absolute tort immunity. Okay? Even for beating people up. Now, suppose they did have that; you could prosecute it as a crime. Now you're in Nevada, and they say, the plaintiff, he beat me up, he came across the state line, down from Lake Tahoe. He was in a bad mood, lost too much money at the casino, and he beat me up. All right? Now, can Nevada bring that lawsuit or not? That's, I think, what Justice Stevens' question was.

MR. LEATHERWOOD: Well – well, I understand that, Your Honor. My position is that even though that law does not exist in California –

[13] QUESTION: Yes.

MR. LEATHERWOOD: – but applying –

QUESTION: If it did.

MR. LEATHERWOOD: – applying it – my – our particular theory –

QUESTION: Yes.

MR. LEATHERWOOD: – that, yes, we – then Nevada would be obligated under the Full Faith and Credit Clause to apply that particular law. But –

QUESTION: And, therefore, you could not bring the lawsuit in Nevada about somebody beating somebody up.

MR. LEATHERWOOD: If –

QUESTION: If that were the law in California.

MR. LEATHERWOOD: – if that were – if that were the case. But –

QUESTION: Yeah, okay.

MR. LEATHERWOOD: – in this particular case, that's illegal in California and that's illegal in Nevada.

QUESTION: So how, then, do we reconcile that position, where we're back to our starting place, with the fact that he could bring an action if on his way down from Lake Tahoe in the state car, he happened to drive a little negligently and ran somebody over? I mean, that's Nevada v. Hall, just reverse the states.

MR. LEATHERWOOD: No, and we're agreeing with [14] Nevada v. Hall.

QUESTION: I know. So this is why we're having a problem.

* * *

[17] QUESTION: Suppose the tax collector were driving negligently in Las Vegas. It's very important for the tax collector to go examine the record, and he's driving negligently. What –

MR. LEATHERWOOD: I think, under Nevada v. Hall, he would be – he would be subject to negligent liability. It's not connected to a core silent function because the function here is – the function here is a tax [18] investigation, whereas, driving is something that you can investigate independent of the tax process itself.

QUESTION: So suppose that we – we conclude that footnote 24 does not provide sufficient guidance for us to have a stable jurisprudence and that you will lose unless Nevada versus Hall is overruled. Would you then ask us to overrule Nevada versus Hall?

MR. LEATHERWOOD: Your Honor –

QUESTION: I know you don't want to entertain that possibility, but suppose that's what we conclude.

MR. LEATHERWOOD: Well, we – we've thought about this, Your Honor, of course, and we would accept a win, if that's the Court's direction, through overruling Nevada v. Hall, but it's our contention that the Court doesn't have to go that far to get – to get to this point. The Court can literally analogize to the special protections that are provided to state tax systems within the federal system itself.

* * *

[24] QUESTION: Well, are principles of comity dictated by the Constitution? Suppose –

MR. FARR: They are –

QUESTION: – suppose Nevada said they were not going to grant comity?

MR. FARR: That's correct, yes. And I don't think there is a federally enforceable law of state comity, but I think that is the system that has existed essentially between sovereigns for much longer than the United States is –

QUESTION: Well, is it your position then the private plaintiff can always bring suit against a state in [25] the courts of another state?

MR. FARR: Well, the first question, of course, is whether the court has legislative – the first Full Faith and Credit question is whether the court in which the suit is brought has legislative jurisdiction. So there is a requirement that that state have constitutionally sufficient contacts with the law –

QUESTION: Well, then under due process. Well, that's easy to satisfy.

MR. FARR: So assuming that they've satisfied that, they are entitled to bring a suit. Then the question is whether the state – and I – and I believe at that point the state is free to apply its own laws to protect its own interests. I think that's what the Full Faith and Credit Clause allows. And it is the doctrine of comity that provides the acknowledgment of the state – the other state's interests. And that's typically, in fact, what's happened since Nevada –

QUESTION: It's very –

MR. FARR: – versus Hall –

QUESTION: – it's very odd to me that California can't be sued in its own courts and it can't be sued in a federal court, but it can be sued in a Nevada court,

which, if we follow that declension really has the – has the least interest in maintaining the dignity of [26] the State of California.

* * *

[27] QUESTION: Is – how does Alden fit into this? In Alden, I take it the court now – we've held that a citizen of Maine suing in the State of Maine's courts alleging that Maine had violated a federal law can't do it. Sovereign immunity Right? That's Alden.

All right. Suppose the citizen of Maine walks into a New Hampshire court and brings the same lawsuit [28] against Maine, assuming New Hampshire has appropriate jurisdiction under its own laws.

MR. FARR: Uh-huh.

QUESTION: Do we get a different result?

MR. FARR: Okay, I think that is not a question that is within the notion of the question in this case.

QUESTION: No, no, well –

MR. FARR: I'm sorry. I –

QUESTION: – you see, what I –

MR. FARR: Excuse me.

QUESTION: – nonetheless, although –

MR. FARR: No, I –

QUESTION: – what I'm trying to do is – is sort out what, in my mind, are a set of impossible anomalies, and that's why I ask you that question.

MR. FARR: I'm sorry. I started to answer in the wrong way.

QUESTION: Go ahead.

MR. FARR: What I – I reserve, of course, the point, always, that I don't believe this is within the question presented.

QUESTION: Yeah, yeah, of course.

MR. FARR: But I actually was going – what I meant to say is that I don't think it's the same kind of question in the sense that I think still when you're [29] talking about enforcement of a federal cause of action in another state, that is still really a federal-state question.

QUESTION: See, but –

MR. FARR: That's still –

QUESTION: – your answer, then –

MR. FARR: – an evolving question.

QUESTION: – your answer to my question is Alden cannot be avoided simply by the Maine citizen walking into a New Hampshire court and bringing the same case.

MR. FARR: That's correct.

QUESTION: All right.

MR. FARR: I think that is –

QUESTION: And I would guess that's right.

MR. FARR: – still a federal-state –

QUESTION: All right, assuming that's right –

MR. FARR: – I think that is still a federal-state issue.

QUESTION: – assuming that's right, now, look at the tremendous anomaly, which you were just about to address, and I want to be sure you do. Our citizen of Maine walks into the New Hampshire court and

sues the State of Maine under federal law. And the answer is, he can't do it because of sovereign immunity. Our citizen of [30] Maine does the same thing, but this time his cause of action is state law. And now you say he can do it.

MR. FARR: That's right. And –

QUESTION: And the only difference between the two cases is that his cause of action is federal law in the first case, and he can't sue the state; but state law in the second case, and he can, which, of course, means that the law of New Hampshire binds Maine in a way that federal law cannot. Now, that, to me, I just can't – that, to me, seems so anomalous that – that I'd like an explanation –

MR. FARR: Well –

QUESTION: – if you can give it. And you see how I'm thinking of it as connected here, because the facts here are just part of that general anomaly.

MR. FARR: That's correct. Actually, Justice Breyer, I think that's something that the court, to some extent, addressed in Alden itself –

QUESTION: Uh-huh.

MR. FARR: – in distinguishing the opinion in Nevada versus Hall, when it noted that when you get into the situation of a state being sued in the courts of another state and, as in Nevada versus Hall, under a state cause of action, you have now implicated the sovereignty of a second sovereign. So when one is now looking at the [31] – at the issues of sovereign immunity, one is looking at a different platform of issues and also at a different historical base.

QUESTION: But that seems to make their case even harder. It would be difficult to conceive that the framers thought that Virginia could be sued in Pennsylvania but not in a federal court. I would think that the presumption would be that this was an even stronger case for the exercise of sovereign immunity than when all of the citizens of the union are involved as in the Alden situation –

MR. FARR: Well, I think that –

QUESTION: – in the Eleventh Amendment.

MR. FARR: I mean, I think that there are two things going on. I mean, first of all, the question is not whether they can be sued, but if not, why not. For example, with Pennsylvania and Virginia, as I'm sure the Court is aware, had a – Nathan versus Virginia is a case in which that very situation came up. But in the courts of Pennsylvania, the Pennsylvania Attorney General urged its own courts to recognize sovereign immunity. So that could naturally fit within the idea that Schooner Exchange has made clear, which is that when you're talking about co-equal sovereigns of that nature, one is talking about sovereignty that – excuse me, immunity that is extended [32] as a matter of comity, not as a matter of absolute right of the other sovereign. And the reason is – excuse me – the reason is that if you don't allow the sovereign to execute its own laws within its own territory, you're depriving that sovereign of part of its sovereignty.

QUESTION: Well, doesn't our original jurisdiction as the states between states bear something on this question?

MR. FARR: It bears a little bit. But, of course, Article III itself is not a exclusive jurisdiction

provision. The Section 1251 provides exclusive jurisdiction with respect to suits between states.

QUESTION: The idea that the framers would provide for its original jurisdiction in the Supreme Court in – for suits by one state against another suggests they thought it might be pretty hard to bring such a suit anywhere else.

MR. FARR: Well, and they – certainly as a practical matter, they would have been right, Mr. Chief Justice. I mean, as a practical matter, it has always been difficult to bring a suit against a state, either in its own courts or in the courts of another state. I mean, even since Nevada versus Hall, typically states have granted immunity to other states for when they're sued in their own courts. And if they haven't granted absolute [33] immunity, what they have done, which I think is an important principle emerging – emerging principle of comity, is they have tended to look at their own immunity to see what kinds of suits could be brought against them and to try, then, to grant to the – to the outside sovereign that same type of immunity.

QUESTION: Mr. Farr, have you found other examples around the country of suits by citizens of one state against another state in the other state's courts?

MR. FARR: I –

QUESTION: Is this relatively rare, or is it happening? And in what context is it happening?

MR. FARR: It's relatively rare, and – but there have been some suits. There are a few of them cited in our red brief, if I can find the page number, pages 38 and 39. The – there are suits, for example, negligence

suits involving the release of dangerous persons within another state who have created injury to citizens –

QUESTION: Uh-huh.

MR. FARR: – of that state. There are more commercial-type things involving contracts or – one, in particular, is a it for invasion of privacy when someone who wrote a book disclosed information. In general, though, Justice O'Connor, as I say, some of those suits, the courts have just said, we're not going to hear them [34] whether you have a valid cause of action or not. We're simply not going to – going to recognize that in our courts because of the sovereignty of the defendant. Other courts have said, yes, we will open our courts, but we are going to look to our own immunity to try to have essentially a baseline to measure the sort of immunity that we are going to –

QUESTION: Mr. Farr, are you saying –

MR. FARR: – accept.

QUESTION: – that that, too, is just a matter of comity?

MR. FARR: I do think that that's—

QUESTION: Doesn't –

MR. FARR: – just a matter –

* * *

[35] MR. FARR: But, as I say, the – the notion that comity is – is something that – that doesn't have a force, even though it's not federal enforceable, it seems to me is a little bit of a misperception. Because, again, if one goes back to the notion of the law of nations or separate sovereigns, comity essentially has been the

provision that [36] governs their relations since well before the convention.

* * *

[41] QUESTION: Comity is something like a hearty handshake. I mean, it – it's something that you can't put any – any force to.

MR. FARR: That's – that's true in one sense, Mr. Chief Justice. I mean, when I say it's not – that there's no federally enforceable state law of comity, I – that's true. But at the same time, I mean, the Court's decisions about comity since back in the late 18th century have emphasized that it is a serious doctrine. It's a doctrine built of respect for – for other sovereigns. And in particular – and I think this – this is – also goes to the practical problem that Justices Kennedy and Breyer are asking about – it also does have a healthy measure of self interest in it.

I mean, when – when you are talking about co-[42] equal sovereigns, any sovereign that is exercising jurisdiction over another sovereign understands that that's – the first sovereign – or the second sovereign has the same power and authority over it.

QUESTION: Is – is the question of comity one that has a federal component so that this court should weigh in on when it has to be exercised?

MR. FARR: I don't believe so state versus state, Justice O'Connor. Or course, in the – in the types of cases that the board was referring to this morning, like McNary, there are comity elements. And there – and there is a jurisprudence of this court with respect to federal and state relations which does depend on comity, and that is, of course, federally enforceable. I

don't believe that there is a concomitant enforceable doctrine –

QUESTION: But you're arguing –

MR. FARR: – state to state.

QUESTION: Even in the face – even in the face of some development by state – a state court that seems totally out of whack with our constitutional structure?

MR. FARR: Well, Justice O'Connor, I suppose I should –

QUESTION: Are there no extremes? Is there no limitation?

[43] MR. FARR Well, I – I mean, I'm – I suppose I should pause in the sense that – that if there is something that is so threatening to the constitutional structure and something for which there is no historical basis in – in terms of the – the way that sovereigns deal with each other. Now, see, that's – that's where I think this case is very different, because even though there was certainly a practical tradition that states were not to be sued in other states, as I say, since Schooner Exchange, and, indeed, in Verlinden in 1980, this Court has always taken the position that when you're talking about relationships between sovereigns, and they're coequal sovereigns, and the issue is immunity between them, that is a matter of comity.

* * *

[46] QUESTION: – do I understand – your comity argument basically is – it's kind a self-executing thing, because each time a state has to answer the comity question, it asks the question, what would I do if the

tables were reversed? And as history teaches us, they generally treat the other sovereign the way they would want to be treated themselves. And that's –

MR. FARR: Well –

QUESTION: – well, that's the rule that seems to have been developed without any overriding constitutional command order here.

MR. FARR: That's correct, Justice Stevens. And, in fact, they have become more specific in applying comity, I believe, in saying we want to treat the other sovereign as we do treat ourselves, not just as we want to be treated. We are treating the other sovereign the way we treat ourselves.

QUESTION: What if the – what if the case came, and they didn't do it? Justice Breyer's question, how do I fill in the blank? I – if, let's say, through this intrusive discovery process, systematically applied, they really were interfering with California's taxation, [47] couldn't California bring an original action to enjoin this interference?

MR. FARR: I certainly think that's possible. And, of course, as I've said, I mean, California can try to talk to Nevada and try to reach agreement at a sovereign level about this, or if, in fact – the Full Faith and Credit Clause has a specific express commitment to Congress of the right to declare the effects of other laws.

QUESTION: What would be the underlying –

QUESTION: Underlying –

QUESTION: – substantive law in Justice Souter's proposed original action?

MR. FARR: The – I suppose, I mean, based on what California has said before – said up to now, it would bring it under the Full Faith and Credit Clause, that it would say that there is some requirement –

QUESTION: Well, but we wouldn't need an original action for the Full Faith and Credit Clause. If that's so, it could apply in this case.

MR. FARR: That's correct. I mean, whether they're –

QUESTION: So what's the – what would an original action – there was – there's no underlying substantive standard to apply?

[48] MR. FARR: I mean, the question would be, is there – obviously, the question that's being raised. I am not aware of the federal substantive standard –

QUESTION: We haven't –

MR. FARR: – that says –

QUESTION: – in boundary cases, though, adopted, as a federal rule, something maybe different from the law of either state.

MR. FARR: That's correct. Now, you do have – there are certain cases, in fact, in which you can't have overlapping jurisdiction, where you can't own the same water, you can't own the same land, you can't escheat the same property. So that's true. The court has addressed those kinds of cases. In a situation where you're simply saying another state is applying its laws, I prefer that they apply our laws, and I'm troubled by the discovery that they have – they have allowed in applying their own laws, I'm not sure what the federal principle –

QUESTION: It's not simply that –

MR. FARR: – is that entitles you to stop it.

No. 02-42

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT, ET AL.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

January 21, 2003

[19] These contacts, by themselves, give Nevada a constitutional basis for applying its own law to the torts committed against respondent there. But, in addition, Nevada has significant contacts with the defendant and with its particular acts of misconduct. Although the Board argues as if its actions were only peripherally connected to Nevada, *see* FTB Br. 33-34 n.16, the evidence demonstrates that the Board deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there. *See* pages 2-5 *supra*. Thus, the Board, through its officials, engaged in bad-faith conduct seeking to exact revenues from a particular taxpayer who, it knew, was living in Nevada at the time, repeatedly disclosing confidential information to third parties within and without Nevada. Furthermore, at least one Board official physically invaded respondent's privacy, going to his Nevada house and looking through his mail and trash. These purposeful acts not only supply a basis for exercising personal jurisdiction over the Board, *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985),[5] they strengthen Nevada's territorial interest in assuring redress and give rise to important police power concerns about deterrence of wrongful behavior. Whatever the Board may be free to do in California, it cannot take actions in Nevada, or directly affecting Nevada, without becoming subject to the laws of that

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[5] The Board initially sought to quash the complaint in this case for want of personal jurisdiction, but subsequently withdrew its motion. This case thus raises no question about the rules of personal jurisdiction as they might apply to State defendants.

State. *See generally* Story, *Commentaries on the Conflict of Laws*, §§ 18-19 (2d ed. 1841).[6]

[20] These cumulative interests are more than sufficient to satisfy governing full faith and credit standards. But, in holding that Nevada law should be applied to the intentional tort claims, the Nevada Supreme Court took an additional step: it tailored its analysis to account for the fact that the defendant was a sister State. Thus, to determine whether to defer to California law, the supreme court looked, not to whether Nevada law provides for compensation when the injury is caused by private parties, but whether it does so when the injury is caused by Nevada government officials. Finding that Nevada law barred suits based on the discretionary acts of its own officials, the court concluded that, as a matter of comity, Nevada should apply the comparable California law ostensibly providing immunity for negligent acts of California employees. See Pet. App. 11-12. However, because Nevada law did not give absolute immunity to its own officials for intentional torts, the Court went on to conclude that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it decided that "greater weight is to be accorded Nevada's interest in protecting its citizens

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[6] The Board does not, and could not, claim any expectation that Nevada would recognize complete immunity for its actions. More than a decade before, Nevada had made clear that it would allow compensation for individuals injured by certain acts of sister States, relying in part on the decision in *Nevada v. Hall*. *See Mianecki v. District Court*, 658 P.2d 422, 423-25, *cert. dismissed*, 464 U.S. 806 (1983).

from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

The Nevada Supreme Court, by engaging in this comparative analysis, thus gave full regard for the fact that California is a sovereign State. In applying full faith and credit principles, its reference point was not the liability of private individuals for tortious conduct, but the liability *of the State itself*. In *Nevada v. Hall*, where the respective position of the two States was reversed, this Court noted with apparent approval that California (the forum State) had looked to its own immunity for similar torts in deciding whether to accord immunity to Nevada (the defendant State) under Nevada law. *See* 440 U.S. at 424. The Full Faith and Credit Clause requires no more.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Defendant.

Filed: September 8, 2010

JUDGMENT

(filed under seal by order of the Discovery Commissioner dated February 22, 1999)

This matter came on for trial before the Court and a jury, beginning on April 14, 2008, and concluding with the verdicts of the jury on August 6, 2008 (liability for and amount of compensatory damages), on August 12, 2008 (liability for punitive damages), and on August 14, 2008 (amount of punitive damages), the Honorable Jessie Walsh, District Judge, presiding. Plaintiff Gilbert P. Hyatt appeared with his counsel Mark A. Hutchison, Esq. of Hutchison & Steffen, LLC, Peter C. Bernhard, Esq. of Bullivant Houser Bailey, PC, and Donald J. Kula Esq. of Perkins Cole. Defendant Franchise Tax Board of the State of California appeared with its representative and its counsel, Pat Lundvall Esq., and James Bradshaw Esq., of McDonald Carano Wilson, LLP.

Testimony was taken under oath, and evidence was offered, introduced and admitted. Counsel argued the merits of their clients' cases, the issues have been duly tired, and the jury duly rendered its verdict. The jury rendered a verdict in favor of Plaintiff Gilbert P. Hyatt and against Franchise Tax Board on all causes of action presented to the jury, including Plaintiff's second cause of action for invasion of privacy intrusion upon seclusion, third cause of action for invasion of privacy publicity of private facts, fourth cause of action for invasion of privacy false light, fifth cause of action for intentional infliction of emotional distress, sixth cause of action for abuse of process, seventh cause of action for fraud and eighth cause of action for breach of confidential relationship. This Court previously dismissed Plaintiff's first cause of action for declaratory relief, and that cause of action was not presented to the jury.

The jury returned its verdict awarding Plaintiff Gilbert P. Hyatt compensatory damages of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS ($85,000,000.00) for emotional distress; compensatory damages of FIFTY-TWO MILLION DOLLARS AND NO CENTS ($52,000,000.00) for invasion of privacy; attorneys' fees as special damages of ONE MILLION, EIGHTY-FIVE THOUSAND, TWO HUDRED EIGHT-ONE DOLLARS AND 56 CENTS ($1,085,281.56); and punitive damages of TWO HUNDRED FIFTY MULLION DOLLARS AND NO CENTS ($250,000,000.00).

At the conclusion of the verdict reached on August 6, 2008, the jury was polled, and each juror responded that the verdict as read by the Clerk of the

Court was the verdict of that juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to liability and the amount of compensatory damages awarded on each of Plaintiff's seven claims. At the conclusion of the verdict on punitive damages on August 12, 2008, the jury was polled, and each juror responded that the verdict as read by the Clerk of the Court was the verdict that juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to whether the conduct of the Defendant warranted punitive damages. At the conclusion of the verdict on punitive damages on August 14, 2008, the jury was polled, and seven jurors responded that the verdict as read by the Clerk of the Court was the verdict of juror, with one juror responding in the negative, resulting in a verdict seven (7) in favor and one (1) opposed, as to the amount of punitive damages awarded against Defendant.

NOW, THEREFORE, based on the foregoing, judgment upon the jury verdicts is entered in favor of Plaintiff Gilbert P. Hyatt and against Defendant Franchise Tax Board, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded compensatory damages in the amount of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS ($85,000,000.00) for emotional distress, plus prejudgment interest at the rate of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of $63,184,110.12 from the date the Complaint was served (calculated through August 27, 2008, and accruing from August 27, 2008 at the rate of $16,301.37 per day until the date of this

Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded compensatory damages in the amount of FIFTY TWO MILLION DOLLARS AND NO CENTS ($52,000,000.00) for invasion of privacy, plus prejudgment interest at the rate of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of $38,653,797.60 from the date the Complaint was served (calculated through August 27, 2008, and accruing from August 27, 2008 at the rate of $9,972.60 per day until the date of this Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded attorneys' fees as special damages in the amount of ONE MILLION, EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS ($1,085,281.56), plus prejudgment interest at the rate of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of $497,824.53 from the dates the special damages were incurred (calculated through August 27, 2008, and accruing from August 27, 2008 at the rate of $208.14 per day until the date of this Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded punitive damages in the amount of TWO HUNDRED FIFTY MILLION DOLLARS AND NO/100 CENTS ($250,000,000.00), with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded costs in the amount of to be determined with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded costs in the amount of to be determined [handwritten] with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

Dated this 5 day of ~~August~~ Sept [handwritten], 2008.

JESSIE WALSH
District Judge

JA 201

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

v.

GILBERT P. HYATT,

Respondent.

APPEAL FROM JUDGMENT –
EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA,
CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

Filed: August 7, 2009

APPELLANT'S OPENING BRIEF

[100] Here, the district court excluded FTB's effort to explain extensive efforts by FTB to preserve and produce all Hyatt-related EMC emails, and to explain the circumstances involving the backup tapes. 50 AA 12399 (134) - 12403 (150). The effect of this ruling was to transmute the adverse inference into a mandatory presumption. This was error. The district court's error was compounded during closing arguments, when FTB's counsel was attempting to explain the circumstances, using **stipulated and admitted** exhibits offered by Hyatt at trial. 53 AA 13131 (97) - 33 (105). The district court forbade FTB's counsel from even using these admitted exhibits to argue that the jury should not draw the adverse inference. *Id.*

G. The Compensatory Damage Awards Were Improper

1. At Minimum, All Compensatory Damages Should Have Been Capped

The district court denied FTB's request to apply comity and to limit compensatory damages to $75,000 per claim, which would be the limit for a Nevada government entity. 92 AA 22965; NRS 41.035(1). Instead, the district court allowed the entire $138 million compensatory damages verdict to remain. This was error. As explained in Section IV(B), above, this court and the United States Supreme Court previously determined that comity **must** be applied to California's complete sovereign immunity statute for FTB, to the extent that such immunity aligns with immunity [101] extended to Nevada government entities. The district court should have "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours

of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Franchise Tax Board*, 538 U.S. at 499 (emphasis added). The district court should have also avoided hostility to California's public acts.[80]

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[80] The district court's actions in this context violated FTB's constitutional rights. A state cannot adopt a "policy of hostility" to the public acts of another state. *See Franchise Tax Board*, 538 U.S. at 499, citing *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). In 2003 the United States Supreme Court found no violation of the Full Faith and Credit Clause here, but only because this court's April 2002 order did not exhibit hostility to California, and because this court had given "healthy regard" for California's sovereign status, "relying on the contours of Nevada's own sovereign immunity for suit as a benchmark for its analysis" of FTB's immunity. *Franchise Tax Board*, 538 U.S. at 499. The district court's refusal to apply Nevada's statutory cap was an act of all-out hostility to California, ignoring the benchmark of Nevada's own sovereign immunity, imposing liability far beyond that which would be imposed against a Nevada government agency, and thereby ignoring California's status as a sovereign state. This violated the Full Faith and Credit Clause. Additionally, it is questionable whether there is still validity to the United States Supreme Court's holding in *Nevada v. Hall*, 440 U.S. 410 (1979), which allowed one state to be sued in another state's courts. Revisiting *Hall* was not before the United States Supreme Court in *Franchise Tax Board*, 538 U.S. at 497. But Hall's continuing viability is questionable, in light of more recent decisions; and FTB contends that Hall would most likely be overruled. *See Fed. Mar. Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). This court may evaluate the continuing viability of an old United States Supreme Court opinion, in light of more recent changes in the economy or the law. E.g. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (state court ruled that 25-year-old Supreme Court decision was no longer good law; although Supreme Court reversed on merits, Court did not hold that state court lacked

The analysis in this court's April 2002 order was essentially as follows: (1) comity requires California's immunity statute for FTB to be applied, to the extent that such immunity does not contravene Nevada policies; (2) California's statute provides complete immunity for all of FTB's acts, discretionary or otherwise, but Nevada's statute only provides immunity for discretionary acts; (3) California's immunity statute must be applied, to the same extent that a Nevada entity would receive immunity, and as such, Hyatt's claims based on discretionary acts are dismissed; and (4) FTB is treated no worse than a similarly situated Nevada government entity, and Hyatt is treated no better than if he sued a Nevada government entity.

The very same analysis must apply to the damages cap issue: (1) comity requires [102] California's immunity statute for FTB to be applied, to the extent that such immunity does not contravene Nevada policies; (2) California's Statute provides complete immunity, i.e., zero damages, but Nevada's statute allows damages against a government entity up to $75,000; (3) California's immunity statute must be applied, to the same extent that a Nevada entity would receive immunity, and as such, Hyatt's damages are capped at $75,000; and (4) FTB is treated no worse than a similarly situated Nevada entity, and Hyatt is treated no better than if he sued a Nevada government entity

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authority to question continued validity of U.S. Supreme Court case).

Accordingly, if the court allows any of his claims to stand, the compensatory damages portion of the judgment must be reversed and remanded for entry of a new judgment using the $75,000 cap.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

v.

GILBERT P. HYATT,

Respondent.

APPEAL FROM JUDGMENT –
EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

APPELLANT'S APPENDIX
VOLUME 68

GILBERT P. HYATT

SS# XXX-XX-XXXX

[DISPLAYED IN ORIGINAL; REDACTED FOR JOINT APPENDIX]

FTB RESIDENCY AUDIT 1991

w/p

3/33.1 7/25/94 RESPONSE FROM LA PALMA CITY WATER SERVICES

- Grace Jeng turned on water service 11/26/91
- Mailing address P.O. Box 3357 Cerritos
- Owner listed as Gilbert P. Hyatt

CALIFORNIA TIE – 11/91

- Won't give out mailing address, Ph. # (XXX-XXX-XXXX [displayed in original; redacted for joint appendix])
- Turn off date for Gilbert Hyatt account is 11/26/91

CALIFORNIA TIE – 11/91

3/41 8/10/94 LETTER TO ORANGE COUNTY RECORDER

3/50 8/11/93 COPY OF LETTER FROM CITY OF LA PALMA TO GILBERT HYATT FOR BUSINESS LICENSE FOR DIGITAL NUTRONICS

3/42	8/31/94	RESPONSE FROM ORANGE COUNTY RECORDER Copy of Grant Deed for La Palma house dated 10/1/91
3/43	11/10/94	COPY OF GRANT DEED FOR LAS VEGAS HOUSE Granted to Michael Kern as trustee for Kern Trust dated 3/24/92
3/44	11/4/94	LETTER FROM CLARK COUNTY RECORDER No record of trust in county records.
3/45	12/1/94	LETTER TO PRISCILLA MAYSTEAD (EX-WIFE)
3/46	12/5/94	LETTER TO REPRESENTATIVE MIKE KERN (IDR #7)

12/6/94 Interviewed the taxpayer's exwife Priscilla Maystead at her residence. Affidavit was obtained. See w/p A1 [handwritten].

12/12/94 Mrs. Maystead called and gave me the telephone numbers for other relatives who would like to speak to me:

(Mrs. Maystead – Exwife) (XXX)XXX-XXXX

(Mike Hyatt – Brother) (XXX)XXX-XXXX

(Yvette Covery – Sister) (XXX)XXX-XXXX

(Beth Hyatt – Daughter) (XXX)XXX-XXXX

[All phone numbers displayed in original; redacted for joint appendix]

12/16/95

Yvette Covery, the taxpayer's sister called. She said that she does not see her brother anymore since the lawsuit over their mother's estate. She may be able to send some documentation regarding the lawsuit. She stated that she would call back.

12/19/4

I interviewed the taxpayer's brother Michael Hyatt at his residence. Affidavit was obtained. See w/p A2 [handwritten].

1/5/95

Mike Kern (rep from Las Vegas) called. See memo of telephone conversation at K/1 [handwritten]. The taxpayer's representative Mike Kern called from Las Vegas to tell me that he wouldn't be meeting the deadline of 1/6/95 which had been set for the document request sent to his office. He said that he had been skiing with the taxpayer at Mount Charleston over the weekend and had discussed the issue with him. He explained to me that he is good friends with the taxpayer and that they often spend time together, and include their children sometimes.

Mike felt that the document request is unreasonable, as it would cost the taxpayer too much

in professional fees to copy all of the checks. He wanted to know if we would be willing to bear the cost, or if I would be willing to come to Las Vegas to do the photocopying myself. I told him that I would check on the policy of the department and get back to him about this.

Mike said that he felt that he had provided enough documentation to prove that Mr. Hyatt was a Nevada resident. Mike said that Mr. Hyatt is in Nevada now: he owns a house in Nevada and no longer owns any property in California. According to Mike, Mr. Hyatt's cars are registered in Nevada. Mike said that Mr. Hyatt moved himself to Nevada in a trailer that Mr. Hyatt owns. After moving to Nevada, he changed the registration on this trailer to Nevada. Mike does not understand why we don't accept this.

Mike explained that he and Mr. Hyatt had been involved in the political campaign for the Nevada Governor Miller. They also were supporting the Nevada senator and other judges. He said that Mr. Hyatt had been involved in the GATT legislation. He said that he would provide a letter from the governor of Nevada stating that Mr. Hyatt was a Nevada resident, and that this should be sufficient documentation.

I explained to Mike that I was not questioning whether or not Mr. Hyatt was in Nevada, that I was just trying to determine the date that he left California. I explained that the copies of the checks were required by our legal department. This documentation is analyzed to determine a pattern of the taxpayer's spending habits and to determine when

the taxpayer severed ties with California and established ties in the state of Nevada.

continued...

JA 212

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

v.

GILBERT P. HYATT,

Respondent.

APPEAL FROM JUDGMENT –
EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

RESPONDENT'S APPENDIX
VOLUME 83

STATE OF CALIFORNIA
FRANCHISE TAX BOARD

AFFIDAVIT

State of California, Chatsworth
County of Los Angeles

I, Pricilla Louise Maystead state that:

I reside at XXXXX [displayed in original; redacted for joint appendix] Chatsworth.

I certify that on December 6, 1994 I was interviewed by Sheila Cox and Barry Gilbert, representatives of the State of California, Franchise Tax Board.

During the interview I indicated the following:

Question: Do you know Gilbert P. Hyatt and how long have you known him?

Answer: I have known him since 1958.

Question: What is your current relationship with Gilbert P. Hyatt?

Answer: I am his ex-wife. We were married for seventeen years.

Question: To the best of your knowledge, where does Mr. Hyatt reside and how long has he resided there?

Answer: Supposedly he bought a house in Vegas. I was in Vegas a year ago April (April 93) with my daughter, the house was overgrown with weeds. ~~At that time he was in house in La Palma~~ ["PM" written in margins]. A friend served papers at the house in La Palma in December of 1992 and saw him there.

In the deposition he claimed that he had sold the La Palma house. We checked the records, but found no record of the ale.

I do not know the exact date that he supposedly moved to Las Vegas, but I think that it was after he got the money.

Question: How often and upon what occasions have you seen Mr. Hyatt since 1991?

Answer: He and I don't talk. I have never seen the La Palma house. I have seen him in depositions in March of 1993 in Las Vegas. In the depositions, he has stated that he is a resident of Las Vegas. There was a subsequent deposition in Los Angeles in March or April of 1993. The court case was in June 1993.

Question: Have you been to Mr. Hyatt's home since 1991 and if so, upon what dates and occasions? If yes, did you observe Mr, Hyatt at his home?

Answer: (not applicable)

Question: To the best of your knowledge, does anyone reside with Mr. Hyatt? If so, who is (are) the individual(s)? Have you observed this (these) individual(s) at the residence?

Answer: There is a woman named Grace, a Chinese woman. She is an employee or something. I have met her on numerous occasions at family events. She is very nice.

Question: Were any vehicles kept at the property? If so, what kind and who used them?

Answer: He drives a Lexus. He also bought a light blue Toyota Celica. He got the Toyota in 1990 or 1991.

He got the Lexus within the last ~~few~~ ["two" and "PM" written in margins] years ago.

Question: Does Mr. Hyatt have children? If so, what are their ages and residence?

Answer: My son Danny lives in Long Beach. He has one son. He is 31 years old.

My daughter lives in West Los Angeles. She is 28 years old. She has no children.

My oldest son is deceased. He has two children that live in Anaheim Hills.

Question: Does Mr. Hyatt visit his children on a regular basis to the best of your knowledge? If so, how often and where do they visit each other?

Answer: My daughter and he had a falling out over the case. She would go to Las Vegas to see him or meet him here. She would meet him at his place or at restaurant. They have not seen each other since before June of 1993. He sees my son often. They are rather close. I do not know where and how often they visit each other. The grandchildren go to Las Vegas to see him. The grandchildren visit him here.

Question: Were you aware of Mr. Hyatt's involvement in social or community activities? If so, what types of activities?

Answer: He was never involved in any community activities. He and I belonged to Temples at my urging. I am not aware of any temples that he belongs to now.

Question: What is your knowledge about Mr. Hyatt's business activities during the period from 1990 to the present?

Answer: I know primarily what I have read in the papers. He is getting a lot of royalties. Phillips was the first U.S. corporation to pay royalties. There are Japanese companies paying him royalties. He is getting a lot of royalties from Intel.

He had a corporation Digital Nutronics. He wrote the child support checks on this account. He wanted his children to give their paychecks to him and then he would pay them through the corporation. ["THE CHILDREN TOLD ME THIS. P.M." handwritten in margins.]

He was paying child support from 1977 through 1984. He also paid $300 per month rent for his daughter while she was a student at UCLA until 1990.

Mr. Hyatt was into sailing and flying during the years that we were married. He took flying lessons. He liked to dance also.

Mr. Hyatt was represented by Mayor Richard Riordan's firm in the lawsuit. Greg Roth was the other attorney. The other attorney was Lesley Andrus. All of the attorneys were located in California.

He told my daughter that he had colon surgery during 1991 or 1992. She was visited him in the hospital around 1990 or 1991. She would know which hospital he had been in.

I have heard that Mr. Hyatt helped my son to prepare false tax returns. My son died in 1990. That would have been in 1987, 1988, and 1989. My son had not been preparing tax returns. I told him to go to an accountant.

Mr. Hyatt had (and still has) a P.O. Box in California for correspondence. That is the address that we have used to correspond with him.

Mr. Hyatt is still fighting with his brothers and sisters over the settlement of his mother's estate. The estate is in Orange County. There was a lawsuit relating to the estate. Her name is Anna Haber Hyatt.

Most of Mr. Hyatt's money had gone into fighting the patents. He is kind of eccentric and he never spent much money on clothes or anything. He did consulting work to get money while fighting the patent.

Mr. Hyatt got his electrical engineering degree from Berkeley and his Masters degree from USC. He got the master's degree while we were married.

Mr. Hyatt may be a republican contributor to Mayor Riordan and Pete Wilson. He has ties with the president of USC.

I have read the foregoing consisting of 5 page(s). I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each.

I made this statement freely and voluntarily, without any threats or rewards, or promises of reward having been made to me in return for it.

s/Priscilla Louise Maystead
(Signature of Affiant)

12/6/94
(Date)

_____
(Telephone number of Affiant)

Subscribed and sworn to
before me this 6th day of
December, 1994 at
Chatsworth, CA.

s/Sheila Cox	s/Barry Gilbert
(Signature)	(Signature of Witness)
Tax Auditor	12/6/94
(Title)	(Date)

STATE OF CALIFORNIA
FRANCHISE TAX BOARD

AFFIDAVIT

State of California, Escondido
County of San Diego

I, Michael A. (Brian) Hyatt state that:

I reside at XXXXX [displayed in original; redacted for joint appendix] Escondido.

I certify that on December 19, 1994 I was interviewed by Sheila Cox and Jahna Alvarado, representatives of the State of California, Franchise Tax Board.

During the interview I indicated the following:

Question: Do you know Gilbert P. Hyatt and how long have you known him?

Answer: I have known him since I was born. He is my older brother.

Question: What is your current relationship to Gilbert P. Hyatt?

Answer: We are estranged.

Question: To the best of your knowledge, where does Gilbert Hyatt reside and how long has he resided there?

Answer: To the best of my knowledge, he has two residences. He has a house on Jennifer Lane in La Palma. He also has a house in Las Vegas, according to what I have been told and seen on television. The program was Inside Edition. He did use a post office

box in Cerritos for his mail. I can't state for a fact whether he still uses this post office box or not. He moved from a home in La Palma about 1983 when he purchased the home on Jennifer Lane. I stopped contact with him ~~at~~ ["about, BH" handwritten in margins] the end 1990.

Question: How often and upon what occasions have you seen Gilbert Hyatt since 1991?

Answer: I saw him in court on a couple of occasions. The court was in Santa Ana California. My attorney went to Las Vegas to his home during 1991 and 1992 and deposed him there.

Question: Have you been to Gilbert Hyatt's home since 1991 and if so, upon what dates and occasions? If yes, did you observe Mr. Hyatt at his home?

Answer: I have not been to his home since 1991.

Question: To the best of your knowledge, does anyone reside with Gilbert Hyatt? If so, who is (are) the individual(s)? Have you observed this (these) individual(s) at the residence?

Answer: Yes, one that I know for certain is Grace the Chinese girl. She is his assistant. She takes care of his home, cooks, etc. I don't know her last name. I heard that she stays here. I don't know if she stays in the house or keeps it. I have met Grace before.

Question: Were any vehicles kept at the property? If so, what kind and who used them?

Answer: During the time period 1990 approximately, Gil had a Toyota subcompact and Grace had something similar.

Question: Does Gilbert Hyatt visit his children and grandchildren on a regular basis to the best of your knowledge? If so, how often and where do they visit each other?

Answer: I have heard that he has had them visiting them in Las Vegas. I do not have any personal knowledge of their visits.

I have heard secondhand that two of my children attended a Seder at Gilbert's residence in Las Vegas last year (September 1993). His son Danny and his girlfriend were also there.

Question: Were you aware of Gilbert Hyatt's involvement in social or community activities? If so, what types of activities?

Answer: He was in Parents without Partners in 1981. He got me into Great Expectations also. He was a member in 1988 approximately. This was in the Irvine and Los Angeles chapters for lifetime members. He may be inactive or he may have sold his membership. We also used to attend dances, etc. He used to be a dance instructor.

Question: What is your knowledge about Gilbert Hyatt's business activities during the period from 1990 to the present?

Answer: He always wanted to pay my expenses with checks. He wanted me to give him receipts from restaurants. etc. He wanted receipts for anything. He would pay with a check with a stamp which said "private contractor." He would use these receipts for business expense writeoffs, so he wouldn't have to pay income taxes. He did that with many people. He also did this with his former girlfriend Helene (Lenny).

At his residence in La Palma, he always had lights on, televisions on, etc. He told me that he had an illegal hookup to get electricity for free, in addition to his regular service.

My brother had a philosophy to cheat the U.S. Government. File for a patent, keep it pending, wait a long time, then file an addendum. The technology will catch up during time, and then you may claim credit for the invention, even though you had never made a working model. You are filing the idea, and you keep it alive by adding to it. At such a time that it becomes feasible, he will allow the patent to be issued.

He met with Phillips Corporation in Holland. They are paying him royalties to go after the other companies involved with the patent [",I believe. BH" written in margins].

During 1982-1983, I was helping him toward the potential of developing the idea of a liquid crystal television with a laser. My idea was holographic projection television. He was supposed to help me with the patent. He used this idea and gave it away. I sued him on that and he got sanctions against me. It was not patented, so there was no patent fraud. I could have sued him for business fraud. There were two other lawsuits. There was a lawsuit involving my mother's estate.

My collection of antiques were stored in his home in La Palma. He had a secret storage area behind the steps in the basement where he hid documents and things. He had had this assembled. He had this built in 1983. I had to sue him to get my things back. I got my items back in late 1990. Since that date, I have only seen him in court.

Question: Do you have any knowledge about doctors which Gilbert Hyatt has seen in the past and any medical history of Gilbert Hyatt?

Answer: I have heard that he had colon cancer and that he had had surgery. Where and when I don't know. I know that he quit drinking.

I have read the foregoing consisting of 4 page(s). I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each.

I made this statement freely and voluntarily, without any threats or rewards, or promises of reward having been made to me in return for it.

s/Michael A. (Brian) Hyatt
(Signature of Affiant)

12/19/94
(Date)

_____
(Telephone number of Affiant)

Subscribed and sworn to
before me this 19th day
of December, 1994 at
Escondido, CA.

s/Sheila Cox
(Signature)

Tax Auditor
(Title)

s/Jahna Alvarado
(Signature of Witness)

12/19/94
(Date)

1/24/95

Licensing Executives Society
41 East Avenue
Norwalk, Connecticut 06891

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Licensing Executives Society
71 East Avenue
Norwalk, Connecticut 06851

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix] or Corporation No:
Gilbert P. Hyatt	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for society

2. Copy of any address changes submitted and dates submitted.

3. Records of attendance at meetings or functions for the Society.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

1/24/95

Association of Computing Machinery
P.O. Box 12115 Church Street Station
New York, New York, 10249

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Association of Computing Machinery
P.O. Box 12115 Church Street Station
New York, New York 10249

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix]
Gilbert P. Hyatt	or Corporation No:
	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for the Association.

2. Copy of any address changes submitted and date submitted.

3. Records of attendance at meetings or functions for the Association.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

1/24/95

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 89109

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 39109

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix] or Corporation No:
Gilbert P. Hyatt	
	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership in NDA.

2. Copy of any address changes submitted and dates submitted.

3. Records of attendance at any meetings or functions for the Society

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

The People of the State of California to:

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 39109

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix] or Corporation No:
Gilbert P. Hyatt	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership in NDA.

2. Copy of any address changes submitted and date submitted.

3. Records of attendance at any meetings or functions.

We can not find any listings for: Digital Nutronics or Gilbert Hyatt.

[illegible signature] [handwritten in margins]

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: January 24, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

1/24/95

Great Expectations
18818 Teller Ave. Suite 110
Irvine, CA 92715

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Great Expectations
18818 Teller Ave. Suite 110
Irvine, CA 92715

In the matter of:	Social Security No. or
Gilbert P. Hyatt	Corporation No: XXX-XX-XXXX [displayed in original; redacted for joint appendix]
	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership and type of membership.

2. Copy of any address changes submitted and dates submitted.

3. Current status of membership.

4. Records of contact with the Great Expectations office.

5. Records of attendance at any functions.

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: January 24, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

1/24/95

Great Expectations
11640 South Sepulveda Suite 100
Los Angeles, CA 90025

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Great Expectations
11640 South Sepulveda Suite 100
Los Angeles, CA 90025

In the matter of:	Social Security No. or Corporation No: XXX-XX-XXXX [displayed in original; redacted for joint appendix]
Gilbert P. Hyatt	
	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership and type of membership.

2. Copy of any address changes submitted and dates submitted.

3. Current status of membership.

4. Records of contact with the Great Expectations office.

5. Records of attendance at any functions.

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: January 24, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

1/26/95

Temple Beth Am
4180 Pecos Road
Las Vegas, Nevada

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Temple Beth Am
4180 Pecos Road
Las Vegas, Nevada

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix] or Corporation No:
Gilbert P. Hyatt	
	For the years:

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for society.

2. Copy of any address changes submitted and dates submitted.

3. Records of attendance at meetings or functions for the Society.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 26, 1995

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

2/17/95

Temple Beth Am
9001 Hill Point
Las Vegas, Nevada 89134

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

Sheila Cox
Tax Auditor

The People of the State of California to:

Temple Beth Am
9001 Hill Point
Las Vegas, Nevada 89134

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix]
Gilbert P. Hyatt	or Corporation No:
	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership and type of membership.

2. Copy of any address changes submitted and date submitted.

3. Records of attendance at any services, meetings, or functions for the Society.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 2/17/95

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

February 28, 1995

Ms. Sheila Cox
Tax Auditor
Franchise Tax Board
333 N. Glenoaks Boulevard
Suite 200
Burbank, California 91502-1170

Re: Gilbert P. Hyatt – 1991 Taxable Year

Dear Ms. Cox:

Per your request, enclosed are copies of the taxpayer's bank account statements and cancelled checks for the Nevada bank accounts he maintained in 1991 and 1992. As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access.

We appreciate your understanding and cooperation.

Sincerely,

s/Eugene G. Cowan
Eugene G. Cowan
of RIORDAN & McKINZIE

3/23/95

Congregation Ner Tamid
2761 Emerson Avenue
Las Vegas, Nevada 89121

Gentlemen:

For the purpose of administering the Personal Income Tax Law of the State of California, we would appreciate your cooperation in providing the documents specified in our form FTB 4973-39 here enclosed.

For your convenience we have enclosed self addressed, postage paid envelopes.

Thank you very much for your cooperation.

s/Sheila Cox
Sheila Cox
Tax Auditor

The People of the State of California to:

Congregation Ner Tamid
2761 Emerson Avenue
Las Vegas, Nevada 89121

In the Matter of:	Social Security No.: XXX-XX-XXXX [displayed in original; redacted for joint appendix]
Gilbert P. Hyatt	or Corporation No:
	For the years:

This demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit, or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Please verify dates of any contributions made since 1991.

2. Copy of application for membership.

3. Copy of any address changes submitted and date submitted.

4. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: 3/23/95

Telephone: (XXX) XXX-XXXX [displayed in original; redacted for joint appendix]

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,
v.
GILBERT P. HYATT,
Respondent.

APPEAL FROM JUDGMENT –
EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

RESPONDENT'S APPENDIX
VOLUME 84

April 11, 1995

Tadashi Sekizawa
President and Representative Director
Fujitsu Limited
6-1, Marunouchi 1-chome
Chiyoda-ku, Tokyo 100, Japan

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates wire transfers were made to Gilbert P. Hyatt. Please refer to copy of letter enclosed.

For your own convenience, you may make marginal notations on this copy of this letter and return it in the enclosed envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (XXX) XXX-XXXX (displayed in original; redacted for joint appendix)

7.9 Any communication under this Agreement shall be in writing and shall be effective upon sending the communication via facsimile or via first class mail, postage prepaid to:

(a) *If to* COMPANY

FUJITSU LIMITED
6-1, Marunouchi 1-chome
Chiyoda-ku, Tokyo 100, Japan
Telephone No.: XXX-XX-X-XXXX-XXXX (displayed in original; redacted for joint appendix)
Facsimile No.: XXX-XX-X-XXXX-XXXX (displayed in original; redacted for joint appendix)
Attention: General Manager
Legal Division

(b) If to HYATT:

Gilbert P. Hyatt
c/o Gregory L. Roth, Esq.
PRETTY, SHROEDER, BRUEGGEMANN &CLARK
444 South Flower Street, Suite 2000
Los Angeles, California 90071-2921
United States of America
Telephone No.: (XXX) XXX-XXX (displayed in original; redacted for joint appendix)
Facsimile No.: (XXX) XXX-XXX (displayed in original; redacted for joint appendix)

Each party may change its address given above by written notice to the other party. The new address will become effective upon receipt of such notice.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate counterparts.

FUJITSU LIMITED	GILBERT P. HYATT
By: s/Tadashi Sekizawa Tadashi Sekizawa	By: s/Gilbert P. Hyatt Gilbert P. Hyatt
Title: President and Representative Director	
Date: October 23, 1991	Date: October 14, 1991

April 11,1995

Akiri Kokaji, Assistant Director
Matsushita Electric Industrial Co., Ltd.
Intellectual Property Center
1006, Kadoma, Kadoma-shi
Okasa 571 Japan

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates wire transfers were made to Gilbert P. Hyatt. Please refer to copy of letter enclosed.

For your own convenience, you may make marginal notations on this copy of this letter and return it in the enclosed envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (XXX) XXX-XXXX (displayed in original; redacted for joint appendix)

Mr. Gilbert P. Hyatt
7841 Jennifer Circle
La Palma, California, 90623

November 15, 1991

Dear Mr. Hyatt:

We are happy to reach an agreement with you on this matter. As Dr. Mizuno, Executive Vice-President of our company has signed the Patent Agreement, we would like to send it to you, please find.

With best regards.

Yours sincerely,

s/Akira Kokaji
Akira Kokaji
Assistant Director
Intellectual Property Center

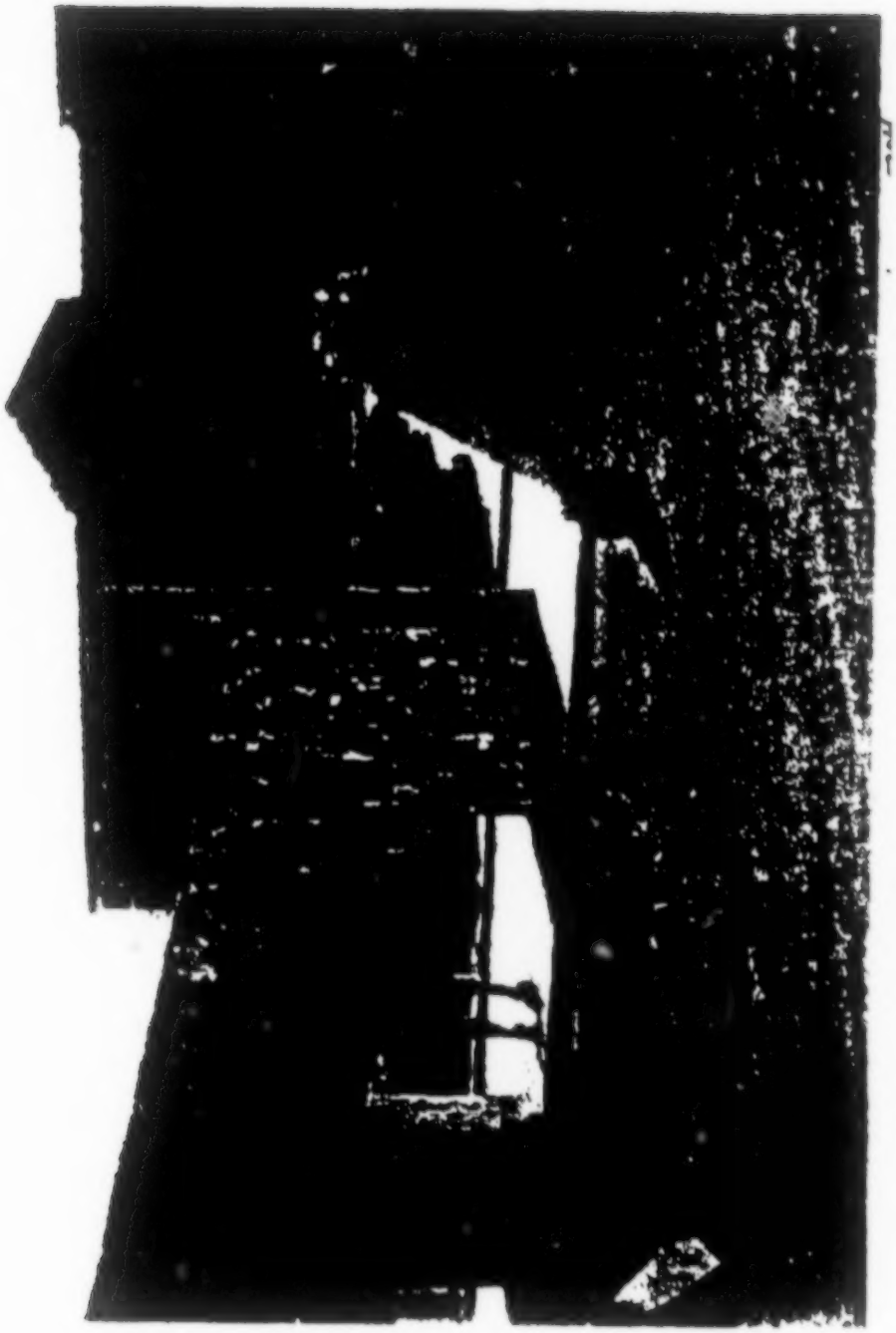
IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,
v.
GILBERT P. HYATT,
Respondent.

APPEAL FROM JUDGMENT –
EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

RESPONDENT'S APPENDIX
VOLUME 85



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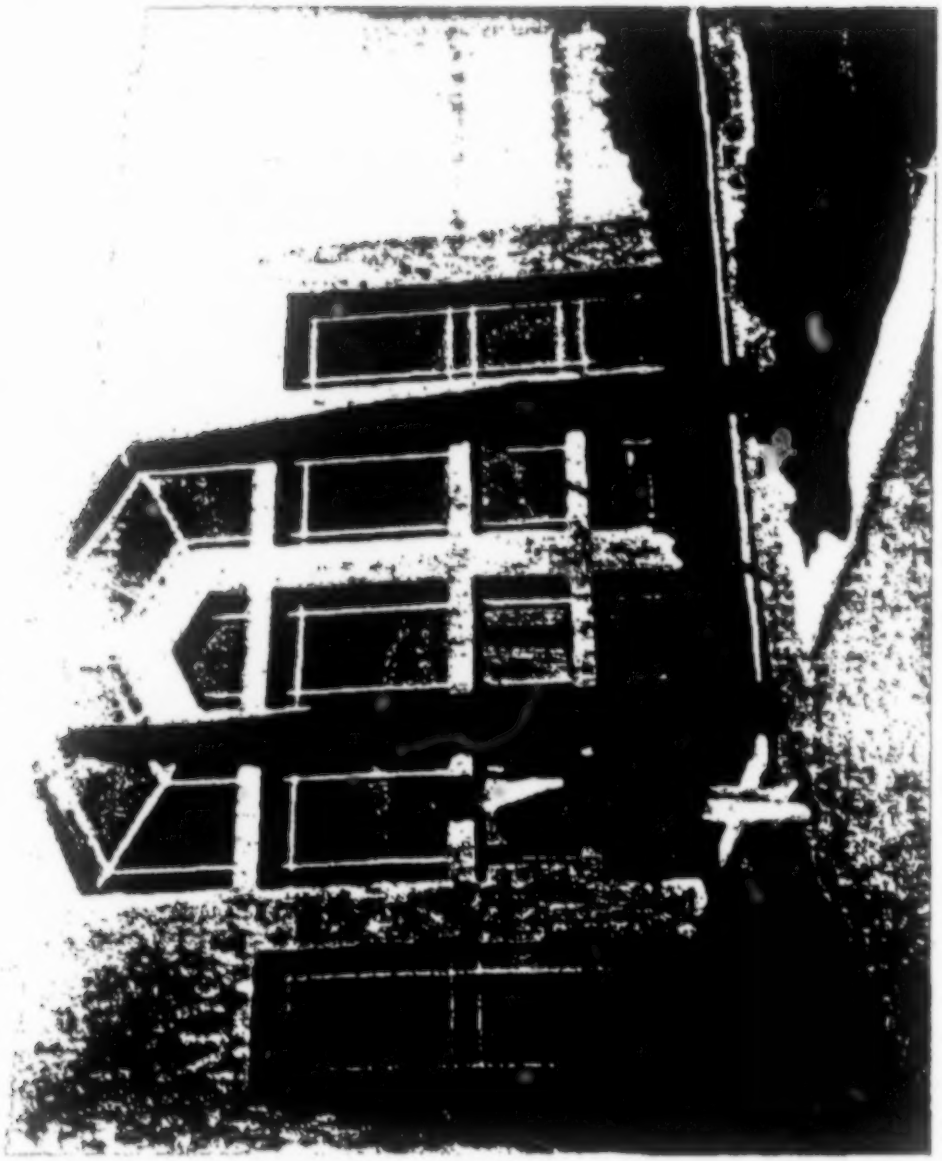
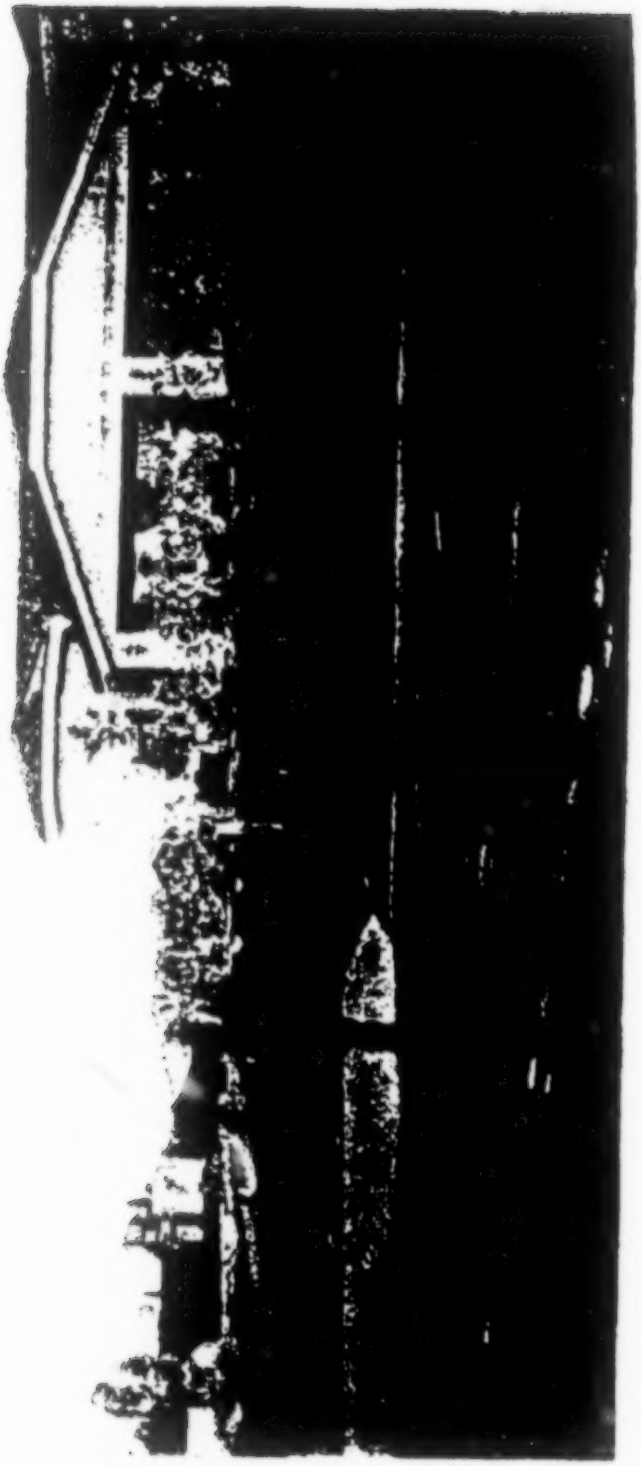


RA021012



RA021013

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Wednesday, April 23, 2008

JURY TRIAL DAY 6 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF:	DON KULA, ESQ. MARK HUTCHINSON, ESQ. PETER BERNHARD, ESQ.
FOR THE DEFENDANT:	PAT LUNDVALL, ESQ. JAMES BRADSHAW, ESQ. CARLA HIGGINBOTHAM, ESQ.
ALSO PRESENT:	GILBERT P. HYATT Plaintiff

VIDEOTAPE DEPOSITION OF CANDACE LES

[163] MR. BOURKE. Did you become familiar with an auditor named Sheila Cox?

MS. LES: Yes.

Q: Did you become familiar with an audit that Sheila Cox was handling called the Hyatt audit?

A: Yes.

Q: Could you tell me about your relationship with Sheila Cox.

A: We were friends and then we weren't.

Q: During the time that you were friends did she talk to you about the Gil Hyatt audit?

A: Yes.

Q: Could you tell me the period of time when you first met Ms. Cox.

A: I don't really recall. I think after she started I met her. She started some years after me, three or four after me.

Q: Would a rough approximation be around 1993 to 1997 you were close friends with her?

A: We weren't close friends in the beginning, but, yeah, I met her in probably '93

Q: And with respect to the time you met her, did you have any professional relationship with her? Were you more experienced at that time than she was?

[164] A: Yes.

Q: And were you already handling residency cases?

A: Yes.

Q: When you met her in '93, had she handled any residency cases?

A: No.

Q: Did you have any role in training Ms. Cox?

A: I believe I did.

Q: Were you ever assigned to the Gil Hyatt audit at the FTB?

A: No.

Q: Ms. Cox and your relationship eventually did have a breakdown, correct?

A: Yes.

Q: What month and year was that?

A: It began around 12, '96.

Q: And did there reach kind of a crisis point or a time of estrangement begin?

A: Yes.

Q: What month and year was that?

A: March '97.

Q: And at that point in time did you and she reach the mutual agreement about terminating your relationship?

A: Yes.

Q: What motivated you to terminate your relationship with [165] her?

A: I could no longer tolerate her.

Q: What was it that caused you to decide not to be a friend with her anymore?

A: As I stated then and now, it's philosophical and spiritual differences.

Q: Did any of those differences relate to racism?

A: Yes.

Q: Could you tell me what you have in mind about Sheila Cox being a racist?

A: It would be my opinion that Sheila Cox is a racist.

Q: Did Sheila Cox ever talk to you relating to the Gil Hyatt case and say anything that could be regarded as racist?

A: I believe so, yes.

Q: And what did Sheila Cox say?

A: Sheila Cox said, "I'm going to get that Jew bastard."

Q: Did you regard what she said about Mr. Hyatt being Jewish as a slur?

A: Well, a racial epithet, you know, to call someone a Jew bastard.

* * *

[171] MR. MOSS: Do you recall whether she said she had seen any neighbors?

MS. LES. Yes.

Q: Did she describe those neighbors for you?

A: Yes.

Q: What did she say?

A: She said that the neighborhood in a cul-de-sac was like on lookout, and there was one guy in particular who had one arm who was like the lookout guy, and it was really creepy.

Q: When she says on the lookout, what did you understand her to mean?

A. The lookout for FTB residency auditors.

Q. Did she say how she knew that they were on the lookout for FTB?

A: No, she didn't.

Q. Did she say how old this one-armed man was?

[172] A: I believe he was described as an old one-armed man.

Q. Did she say that his arm was cut off at the elbow or at the mid arm or –

A. One armed, that's it.

Q. Did she have any other names or words she used to describe the neighbors or associates of Gil Hyatt?

A. She told me it was a cast of ghouls looking out for -like on lookout for State auditors.

Q. Did Ms. Cox ever give you any indication of what it meant to be on lookout for State auditors? Had you ever heard of this before in your career?

A. Yeah. I knew what she meant.

Q. What did she mean?

A. I believe she meant that like to tip him off that the, you know, the federals are here, you know.

Q. Is this the sort of thing that you would expect to be documented or put down in writing in a progress report or in the work papers if it was true and document it?

A. What?

Q. That there were people on the lookout. That she had observed people on the lookout looking out for the FTB people.

A. Well, if it was a fact, I'd expect it to be in work papers.

* * *

[184] MR. BOURKE: Did you ever get the impression or the sense during your audits that sometimes an auditor would get fixated on a particular audit?

MS. LES: Absolutely.

Q. And did that happen to Sheila Cox?

A. Sheila also, yes.

Q. And on what case did Sheila Cox get fixated?

A. I believe the Gil Hyatt case she was obsessed with.

Q. And when you say obsessed, what do you mean?

A. Talk about incessantly, inability to let go even after it was closed to the point where she created a real fiction in her head about it, in my opinion.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Thursday, April 24, 2008

JURY TRIAL DAY 7 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF:	PETER BERNHARD, ESQ. MARK HUTCHINSON, ESQ. DON KULA, ESQ
FOR THE DEFENDANT:	PAT LUNDVALL, ESQ. CARLA HIGGINBOTHAM, ESQ. JAMES BRADSHAW, ESQ.

VIDEOTAPE DEPOSITION OF CANDACE LES

[28] MR. BOURKE: Now, with respect to your career with 300 cases and only two fraud cases, is that unusually low for the FTB, or is that about right?

MS. LES: I'd say it's unusually high.

Q: So the FTB issues a fraud penalty very extremely rarely?

A: From what I saw in my ten years, almost ten years, yes.

* * *

[41] MR. BOURKE: Did she ever tell you about how many information requests she was sending out and what she was observing about Mr. Hyatt?

MS. LES: She talked about it, yeah.

Q: What did she tell you?

A: That she was bombarding him with information document requests, and as I said before, you know, she did talk incessantly about the audit.

Q: Now, you had quite a bit of experience, maybe 60 or [42] more residency audits and a total of 300 audits. Did you send out third-party information demands on a regular basis?

A: No.

Q: When you read the narrative did you get any sense or form an opinion about the strength of the case?

A: When I read the closing letter and had been listening to Sheila talk about the case, I believed she created an entire fiction about the taxpayer.

Q: And why do you say that?

A: I believe – what do you mean why?

Q: What do you base – what did you base your conclusion about that she had created an entire fiction?

MR. WILSON: Object to the question. Go ahead and answer it if you can.

MR. BOURKE: You – let me rephrase it.

BY MR. BOURKE:

Q: You came to a judgment based upon all your discussions with her and having read the narrative, or the closing letter, that she had come up with an entire fiction about Gil Hyatt, right?

A: Yes.

Q: What is it that led you to that belief?

MR. WILSON: Same objection.

THE WITNESS: Okay. It was a process. Over a period of time I saw her uncertain about the case. I saw her [43] rack up a lot of hours on the case and I saw her try to get cosigners, her colleagues, on to the case, which wasn't going too well until she started flavoring it with details about one-armed men and making the taxpayer seem like a vial character. And it was over a period of time where this was done, and then when I finally saw this, the proposed assessment, I thought she had created a fiction about this guy that – and this is how she got legal to buy into it.

Q: When you read the narrative, did you get any sense or form an opinion about the strength of the case?

A: When I read the closing letter, and had been listening to Sheila talk about the case, I believe she created an entire fiction about the taxpayer.

* * *

[46] MR. BOURKE: Now, was one of the criticisms of you by upper management when they wrongfully terminated you that you had improperly settled with taxpayers?

MS. LES: Yes.

* * *

[56] MR. BOURKE: Now, did she ever call Mr. Hyatt any names?

MS. LES: Yes.

Q: What did she call him?

A: She did call Gil Hyatt, just as we talked about yesterday in the opening deposition, was Jew bastard, after she received his synagogue from Las Vegas support letter.

Q: Now, you said that she called one of the neighbors a one-armed man, and another person saying that Mr. Hyatt was surrounded by ghouls. Did she ever have any other insult names that she used on Mr. Hyatt?

A: She called him a cheap bastard.

[57] Q: What did she say about him being cheap?

A: How cheap it was – this was in reference to Grace Jeng's tax returns. I think that she received – Grace Jeng received salary from Gil and –

MR. MOSS: Wait a second. Wait a second. Could she talk about Grace Jeng's –

MR. BOURKE: Grace Jeng is willing to waive any discussion about her tax situation that this witness learned at the FTB.

MR. MOSS: Okay.

THE WITNESS: I thought we went through that yesterday.

BY MR. BOURKE:

Q: Grace Jeng and Gil Hyatt, we can talk about both.

MR. MOSS: Sorry.

THE WITNESS: Sorry. Thanks. Yeah, that somehow the salary that Grace Jeng was being paid by Gil Hyatt, you know, for a millionaire, he was a cheap bastard.

BY MR. BOURKE:

Q: Did she ever call him a freak?

MR. WILSON: Objection, the question leads and suggests.

THE WITNESS: She did.

BY MR. BOURKE:

Q: Was she afraid of him yelling at her or raising his [58] voice?

A: I don't know what her fear stemmed from.

Q: Did she say why she felt he was a freak?

A: Yes.

Q: What did she say?

A: Sheila disclosed to me how Gil Hyatt's son was murdered in Huntington Beach and she thought that that made him a freak.

Q: Because some member of his family was a victim of a crime?

A: Because a member of his family was murdered and it was unsolved.

Q: Did she tell you anything about the murder of his son being a sensitive matter within the family, and did you regard it as a sensitive matter?

A: I certainly did.

MR. WILSON: I object, the question leads. Go ahead and answer.

THE WITNESS: It was a sensitive matter.

* * *

[62] A: And she was at his window, at Gil Hyatt's window or at the house's window, and then she went to the mailbox. She was looking through it. I believe it was trash day. She lifted up the trash lid. And then I got up and I ran across the street to the Gil Hyatt side of the street. I was like, "Come on, come on, let's get out of here, come on."

She came back to the car. She got my camera. She took some pictures. I think I sat down on the curb one more time, and we got in, and we left.

* * *

[134] A: In my opinion Sheila Cox was obsessed with Gil Hyatt, the audit. I had seen other auditors obsessed with cases, it grips them, it takes over them and in my opinion Sheila was obsessed with it.

Q: And can you tell me what facts you saw that back up that opinion?

A: Well, the fact that she talked about Gil Hyatt's case incessantly, at least with me, and that she

seemed not to take advice from people that she specifically sought advice from; that she visited and sleuthed around Gil Hyatt's abode and neighborhood after the audit had been closed and out of her hands. And that really isn't normal, those three things.

Q: Now, with respect to the second one about not taking advice, can you tell me what advice she didn't take?

A: She told me that she asked Alan Shigemitsu for his advice and, you know, after a long time of contemplation or research Alan came up with whatever and she was very dissatisfied with it and she said she wasn't going to listen to what he said. And then with my own advice that I gave her about meeting with the taxpayer, that he would be the most likely one to have the answers and to be able to, you know, fill in the blanks, and she didn't listen to that either.

* * *

[135] THE WITNESS: Okay. I feel that it really is my obligation to correct the record. I read some of the excerpts from the summary judgment, the motion for the summary judgment and the brief, the reply brief, and I do feel like I'm being misrepresented in this regard, and it's about the allegation of racism against Sheila Cox. When I first filed the formal written complaint of harassment against her on October 3rd, 1997, I deliberately coded that charge as philosophical and spiritual differences because I regard a charge of racism as a very, very serious charge. And when I gave it to Brad La Cour, he asked me what I meant. I told him I felt she was a racist, there was no further dialogue. When my formal complaint got in the hands

of Dianne Lawrence, who was supposed to be investigating the complaint, she asked me what that was, spiritual and philosophical differences. And I told her and there was no further discourse on that line. So it's what I've been saying, and as it reads in the brief and the motion for summary judgment, it comes out like Sheila said, you know, "Jew bastard," and that she flatly denies that. And I would have to agree that's not what it [136] was. That was never my testimony, and that was not my characterization of what happened there. I deliberately coded it as spiritual and philosophical differences, and told those who were interested in what that was.

The brand of racism that I experienced from Sheila Cox, and I'm real clear on it, is this kind that I have seen my entire 40 years on this planet. And say I knew Sheila for five years, so that is 1,500 days. I heard her use racial slurs maybe 20 times in all those days, which is 1 percent of the time. So it's like just 1 percent of the time of the whole time I was friends with her. That's not very much at all.

Well, I can't quantify racism. When you get the feeling, when you are raised to be sensitive to it, because you are a minority and you have been the victim of it your whole life, you are aware of it when you see it. And it wasn't just these racial slurs that Sheila made in a joking sense like to say the way she talks out of the side of her mouth, "That Jew bastard," and I knew it was intended as a joke, because she was upset with him. I knew it was just her way of expressing herself, that she cross the line.

* * *

[139] MR. WILSON: [I]s it fair to say you were providing kind of consultant services to the Hyatt team as a former auditor, somebody who had knowledge of the audit process? Was that your function?

MS. LES: Yes, I think so.

Q: Okay. Did you in the course of that, did you do any analysis of the audit, that is, the determination of residency from what was in the file that you reviewed? Did you make any review of that to opine or comment on whether it was adequate, whether it was inadequate, whether there were things that should have been done that weren't, or things that were done that shouldn't have been done?

A: Well, no, it was a given that your client mishandled the whole audit. I mean, that was the fire that was there before I got introduced to these people. So mostly what we talked about were just, you know, I know this is going to sound really abstract, but how to get to the truth of the matter, you know.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Wednesday, April 30, 2008

JURY TRIAL DAY 11 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF:	PETER BERNHARD, ESQ. MARK HUTCHINSON, ESQ. DONALD J. KULA, ESQ.
FOR THE DEFENDANT:	PAT LUNDVALL, ESQ. CARLA B. HIGGINBOTHAM, ESQ. JAMES BRADSHAW, ESQ.

DIRECT EXAMINATION OF EUGENE COWAN

[155] MR. KULA: Okay. This conversation with Ms. Jovanovich, which we've seen both your notes and her notes on, did you consider this some type of a threat from Ms. Jovanovich?

MR. COWAN: No. I did not consider it a threat. She was definitely sending me a message and I understood the message, but it wasn't a threat.

Q: What message did you think she was sending you?

A: It was going to be a large amount of digging and looking into Mr. Hyatt's affairs through the protest process. And for that reason, other taxpayers have really chosen to settle, also, to maintain their privacy.

Q: And was part of the message Mr. Hyatt should consider settling?

A: I think so.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Monday, May 12, 2008

JURY TRIAL DAY 18 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF:	PETER C. BERNHARD, ESQ. MARK HUTCHINSON, ESQ. DONALD J. KULA, ESQ.
FOR THE DEFENDANT:	PAT LUNDVALL, ESQ. CARLA B. HIGGINBOTHAM, ESQ. JAMES BRADSHAW, ESQ.

DIRECT EXAMINATION OF GILBERT P. HYATT

[73] MR. BERNHARD: Now, Mr. Hyatt, after you got word that the '91 audit was being assigned to Ms. Jovanovich for a protest, you understood that Mr. Cowan and Ms. Jovanovich had a telephone [74] call. Is that correct?

MR. HYATT: Yes.

Q: I believe Mr. Cowan testified about that call that there was a message about what would happen if Mr. Hyatt insisted on proceeding with the protest. Do you remember Mr. Cowan's testimony about that?

A: That's correct.

Q: What did you understand the message to be that was conveyed by Ms. Jovanovich to Mr. Cowan to you?

A: I understood that the message was that Mr. Hyatt should settle this case, or we would have a much more intrusive investigation in the protest and make all of his private information public.

Q: Did there come a time when you learned whether or not that message had been carried out?

A: Yes. That's exactly what the FTB did. The – Ms. Woodward was the third protest officer, after Ms. Jovanovich and Mr. Dunn over there. And Ms. Woodward came out with this enormous, very intrusive IDR which asked over 160 questions, many of them very, very personal and very, very silly, and asking for all kinds of documentation, which was to me

an implementation of the – what I considered to be the threat by Ms. Jovanovich.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Thursday, May 22, 2008

JURY TRIAL DAY 26 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF:	PETER C. BERNHARD, ESQ. MARK HUTCHINSON, ESQ. DONALD J. KULA, ESQ.
FOR THE DEFENDANT:	PAT LUNDVALL, ESQ. CARLA B. HIGGINBOTHAM, ESQ. JAMES BRADSHAW, ESQ.

VIDEOTAPE DEPOSITION OF ANNA JOVANOVICH

[79] Q: Would you read your comments on this page, please.

MS. JOVANOVICH: "Talked at length with rep about the status of the case. He was basically interested in two things; one, time frame for resolution of the case, and two, making a pitch as an advocate for the strength of his client's case. Described protest process in detail."

And detail is underlined because I wanted to explain to him the way I handled a protest, in that, I did [80] not view myself as a rubber stamp for the department, but for – as someone who would weigh the evidence from both sides equally, and hold a hearing and so on. And also settlement possibilities. And that was that some – the settlement bureau began, oh, I don't know somewhere in the early 1990's.

The Department had a policy of encouraging settlement, and for someone like Mr. Hyatt who was concerned about privacy, settlement might be a possible solution for him, because I wanted Mr. Cowan to understand that once a case left protest, any other proceeding after that would require public – would become public knowledge. So that a Board of Equalization hearing would be public knowledge, a Superior Court trial would be public knowledge, and I was aware of Mr. Hyatt's concern for privacy. So I mentioned that settlement was one possibility before these matters became public.

And then I explained the necessity because I knew that somewhere along the line I was going to write a huge letter, for extensive letters in these high profile,

large dollar, fact-intensive cases which merit in-depth investigation and exploration of many unresolved facts and questions. Outlined my procedure for reviewing a case on protest and that after I returned to his client's file, which would be now, we are into July – which would be approximately July 2nd after review of intervening case, I [81] would be sending a lengthy letter asking for information and documents.

Told him I would keep him informed as the case progressed and would advised him when review completed. Letter to supervisor, et cetera. Because when I would write such a lengthy letter, I would have to submit it to my supervisor for review. In other words, if we write letters – I don't know what the – what joys you gentlemen have in private practice, but when we in government write letters, they have to be reviewed by many levels, depending on how important the case is or whatever the situation is.

And that's something over which I have no control which I wanted Mr. Cowan to understand also, that if I wrote a letter, it could take sometime for that letter to actually be mailed because of supervisory review. And it says, "he," meaning the rep, "reiterated that his client prefers we finish 1991 first rather than wait to consider it with '92. So it sounds like '92 wasn't finished then at that time.

MR. WILSON: So did you take that to mean that to mean that Mr. Hyatt had expressed an interest in speedy resolution of his protest?

A: Oh, I think they all – all taxpayers do.

Q: I know. I'm sure that most taxpayers do. But specifically with respect to Mr. Hyatt, you took this

conversation to indicate that he wanted his protest resolved [82] as soon as possible?

A: I think I always felt that, because I think they always do, the taxpayers. And I'm not saying this sarcastically. These people have a lot of issues. They want a proper resolution, and they're entitled to one. But if things come up and we are understaffed, we can't always do that. And it's my policy to inform the representatives if there is a delay. And that is what I was doing in the course of these phone conversations. The unfortunate thing was that this was one of the worst cases I had in terms of interruptions.

Q: And you believe that your department was understaffed in the summer of 1997 given the caseload you had?

A: Residency cases started growing and at that time I think the department may have been in the process of hiring additional people.

Q: So the answer is you were understaffed then?

A: I think so.

Q: With respect to the importance of the Hyatt case, how important was it at that time?

A: Well, important in terms of what? I mean, all cases are important. All of these cases are important. We had many high-level, high-profile taxpayer cases with huge amounts of money. And each of them was, as far as I'm [83] concerned, equally important. Of course, those were the – which were the most important were those which had been around the longest.

Q: Had Mr. Hyatt's case been around very long?

A It had been around long, but there may have been some that had been around longer.

* * *

[85] MR. WILSON: With respect to your next sentence, it says that you described in detail and also settlement possibilities?

MS. JOVANOVICH: Right.

Q: Could you tell me what was said about that?

A: About what? The protest process in detail?

Q: And also the settlement possibilities.

A: The protest process meaning that when the case is logged in, it's assigned to someone and how I handle a case, which means that I review every single document in the file. I make notes of things that I feel I need additional information about. I send an extraordinarily lengthy letter to representatives which are never happy to receive, and request all the information that I think is relevant to me to make a determination.

And then I went on to describe, as I said to you before, the appeal process and the – if after a hearing, I were to find in favor of the Franchise Tax Board. I would have no way of knowing at this stage how I would find because [86] I would have to receive all the documents first in order to weigh both sides. There would be a hearing that would be held and then at the conclusion of the hearing, I guess there's a chance for rebuttal if I were to make a finding on behalf of the Franchise Tax Board.

And I wanted to impress upon Mr. Cowan, that I did not view myself as a rubber stamp for the

department, that if the evidence were – supported his taxpayer's position, then I would make such a finding. If not, and I found in favor of FTB, then there were other possibilities for him. One was the Board of Equalization, the other was Superior Court.

I took note of his client's great concern for privacy, and said that many people who have high profile cases sometimes may wish to settle their cases because this might be less intrusive for them, in particular Mr. Hyatt, because he was so concerned about privacy.

The Department had a policy in setting up the settlement bureau to resolve disputes by settlement, and this might be one possible solution for Mr. Hyatt so that he would not have to expose himself to public scrutiny. Because the minute a case goes to the Board of Equalization, all documents become public.

Although, you know, I can't say that there are throngs of crowds that are rushing out to get the documents from the Board of Equalization, and there's usually not much [87] publicity attached to the Board of Equalization or even Superior Court tax cases.

But I felt that Mr. Cowan should be aware that settlement was an option for his client because of his concern for privacy.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Friday, May 30, 2008

JURY TRIAL DAY 30 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF: PETER C. BERNHARD, ESQ.
MARK HUTCHINSON, ESQ.
DONALD J. KULA, ESQ.

FOR THE DEFENDANT: PAT LUNDVALL, ESQ.
CARLA B. HIGGINBOTHAM, ESQ.
JAMES BRADSHAW, ESQ.

CROSS-EXAMINATION OF SHEILA GRADY COX

[128] MR. HUTCHINSON: Okay. And Ms. Les also testified that you and she joked about this, that many of the large income taxpayers in California were Jewish. Was she accurate in her testimony on that point, ma'am?

MS. COX: No, sir, I don't believe so.

Q: Ms. Les testified that the "Jew bastard" comment was made after you received a response from Mr. Hyatt's synagogue and you showed her the letter. Was she accurate, in your opinion, in her testimony on that subject?

A: No, sir. I don't ever recall receiving a response from his synagogue, and that comment that she made about the "Jew bastard" is totally wrong. And I made a statement about that yesterday and it just hurts me deeply. So I don't want to go off on a tirade about that again.

Q: Ms. Les further testified that you made the "Jew bastard" comment in a joking sense out of the side of your mouth and that she knew it was a joke, and that was how you expressed yourself. Was she accurate in that testimony, ma'am?

A: As I said yesterday, I don't – I don't talk in that manner.

[129] Q: And Ms. Les testified that she wanted to correct the record after learning that her testimony had been used in this case regarding the "Jew bastard" comment and said that she had heard you make your – make racist comments maybe 20 times or one percent of the time that you were friends, which she

felt was not that often. Was she accurate in that assessment, ma'am?

A: No, sir.

Q: Okay. Ms. Les further testified that your comments were not restricted to Jewish people; that you felt differently about different minority groups. Was Ms. Les' testimony accurate in that regard, ma'am?

A: No, sir.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P HYATT,
Plaintiff,

v

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Tuesday, June 24, 2008

JURY TRIAL DAY 46 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF: PETER C. BERNHARD, ESQ.
MARK HUTCHINSON, ESQ.
DONALD J. KULA, ESQ.

FOR THE DEFENDANT: PAT LUNDVALL, ESQ.
CARLA B. HIGGINBOTHAM, ESQ.
JAMES BRADSHAW, ESQ.

DIRECT EXAMINATION OF
SHEILA MARIE SIMMONS SEMANA

[138] MS. LUNDVALL: Across the time that you had worked with Ms. Cox, did you ever know her to make discriminatory remarks, particularly against those that may be practicing of the Jewish faith?

MS. SEMANA: No, I did not.

Q: Anything that she would make as far as from the off-color standpoint; any anti-semitic remarks? Anything of that nature?

A: No, she never did.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

CALIFORNIA STATE FRANCHISE TAX BOARD,
Defendant.

BEFORE THE HONORABLE JESSIE WALSH,
DISTRICT COURT JUDGE

Wednesday, June 25, 2008

JURY TRIAL DAY 47 TRANSCRIPT EXCERPTS

APPEARANCES:

FOR THE PLAINTIFF:	DON KULA, ESQ. MARK HUTCHINSON, ESQ. PETER BERNHARD, ESQ.
	PAT LUNDVALL, ESQ.
FOR THE DEFENDANT:	JAMES BRADSHAW, ESQ. CARLA HIGGINBOTHAM, ESQ.

DIRECTI EXAMINATION OF
JAHANA ELVARADO

[78] MR. BRADSHAW: Now, on that occasion or any others, did Ms. Cox say anything derogatory about Mr. Hyatt?

MS. ALVARADO: No, sir.

Q: Did she say anything derogatory about Ms. Jeng?

A: No, sir.

Q: Has she ever made any anti-semitic remarks in your presence?

A: Oh, no.

Q: Or over the phone?

A: No.

DISTRICT COURT
CLARK COUNTY, NEVADA

No. CV-S-98-284 HDM (LRL)

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Filed: March 4, 1998

PLAINTIFF'S MOTION TO REMAND (ORAL ARGUMENT REQUESTED)

Pursuant to 28 U.S.C §1447(c), Plaintiff Gilbert P. Hyatt moves to remand the above-captioned action back to the Eighth Judicial District Court of the State of Nevada in and for the County of Clark (Case No. A382999) because Plaintiff does not wish to burden this Court with an investment of its scarce judicial assets in entertaining the resolution of an action which is outside its jurisdiction. The grounds for Plaintiff's motion to remand are as follows:

1. The Defendant Franchise Tax Board of the State of California ("FTB") is a governmental agency of the State of California which has not received authorization to waive California State immunity under the Eleventh Amendment, and federal district

court jurisdiction to entertain this action is thus foreclosed;

2. Aside from the dispositive intervention of the Eleventh Amendment, there is no federal question upon which this Court could base its jurisdiction; and

3. As a matter of law, no diversity exists by virtue of the State of California, through the FTB, being a party defendant to this action.

[2] A. ANALYSIS

I. Federal Jurisdiction Is Lacking Because Of Eleventh Amendment Immunity; Remand Is Therefore Necessary.

This Court lacks subject matter jurisdiction under the Eleventh Amendment to the Constitution of the United States. Under the circumstances of the instant case, the Eleventh Amendment forecloses federal district court jurisdiction. In relevant part, the Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State. . . ." U.S Const. Amend. XI.

The FTB's removal petition omits reference to a waiver by California of its Eleventh Amendment immunity, and, moreover, California statutory and decisional law leave no doubt that California has not "*by either express language or overwhelming implications*" waived such immunity. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (emphasis added). Without such a waiver by California, this Court is without power to adjudicate the instant dispute and

must remand it back to Nevada's Eighth Judicial District Court.

* * *

[7] The Ninth Circuit touched on this issue as part of a complex fact pattern in which defendants, including the State of Hawaii, removed an action from state to federal court. The District Court thereafter found that certain claims against the state and state employees acting in their official capacities were barred by the Eleventh Amendment, and other claims were not barred due to certain exceptions to the Eleventh Amendment not applicable in the [8] instant action.[6] In addition to other rulings, the Ninth Circuit affirmed the District Court's ruling that it could not hear claims against the state barred by the Eleventh Amendment despite voluntary removal to federal court by the state. *See Kruse v. Hawaii*, 68 F.3d 331, 334 (9th Cir. 1995) (holding that although Eleventh Amendment bar against some claims will not prevent removal, the federal courts may not hear those claims barred by the Eleventh Amendment).[7]

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[6] For example, Congress has the right to abrogate the states' rights under the Eleventh Amendment in legislation enacted in order to enforce the Fourteenth Amendment. *See Atascadero*, 473 U.S. at 238 (reasoning that the Eleventh Amendment is "necessarily limited by the provisions of section 5 of the Fourteenth Amendment," and that Congress may abrogate the Eleventh Amendment without the states' consent when acting pursuant to section 5 of the Fourteenth Amendment). No Fourteenth Amendment claim is at issue in the present action.

[7] Similar to *Stephans*, in *Kruse* the court dismissed the claims against the State over which the federal court lacked jurisdiction under the Eleventh Amendment instead of remanding to state

In the present action, the FTB's removal petition fails to constitute a valid, cognizable waiver of California's Eleventh Amendment as California law gives its attorneys no such authority.

c. California has not waived its Eleventh Amendment immunity in its constitution, statutory laws or decisional law.

Plaintiff has discovered no authority under California law from which it can even be argued that California has waived its Eleventh Amendment immunity or that attorneys representing the state in legal proceedings have such waiver authority. Statutes and case law establish that the opposite is true. *See Riggle v. California*, 577 F.2d 579, 585, 586, n.9 (9th Cir. 1978) (holding that California's Tort Claims Acts waived immunity only for claims filed in its state courts and noting that reference to a state's venue statutes is appropriate when determining waiver of Eleventh Amendment immunity)[8]; *Deseret Water, Oil, & Irrigation Co. v. California*, 202 F. 498, 500 (9th Cir. 1913) (holding that attorney general's appearance in trial court could not be a waiver of Eleventh Amendment immunity when statute authorizing such appearance limited consent of the state to be sued only in its own state courts).

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court because such claims did not, on the face of the complaint, state a cause against the state. 68 F.3d at 334, n.2.

[8] Nonetheless, under *Nevada v. Hall*, 440 U.S. 410, 414 (1979), a state's own sovereign immunity has no application in the courts of a sister state.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-98-0284 (HDM)(LRL)

GILBERT P. HYATT,
Plaintiff(s),

v

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Defendant(s).

May 1, 1998

MINUTES OF THE COURT

PRESENT: HONORABLE HOWARD D. McKIBBEN, CHIEF U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart
Reporter/Recorder: Kathryn M. French

Counsel for Plaintiff(s): Thomas L. Steffen and Mark A. Hutchison

Counsel for Defendant(s): Thomas R. C. Wilson, Matthew C. Addison & Jim C. Guidici

PROCEEDINGS: Telephonic Hearing on Plaintiff's Motion to Remand (#5)

2:00 p.m. Court convenes.

Arguments are made on the motion to remand by Thomas Steffen on behalf of plaintiff and by Thomas Wilson on behalf of defendant.

The court sets forth the findings of fact and conclusions of law on the record.

IT IS ORDERED that Plaintiff's Motion to Remand (#5) is granted. Plaintiff's motion for costs is *denied*. This case is remanded to the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

The remaining motion, Defendant's Motion to Quash Service of Process and for No Other Relief (#12), is reserved for the state court to address.

2:35 p.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/ [Illegible]

Deputy Clerk

SUPREME COURT, U.S.
FILED
SEP 10 2015
OFFICE OF THE CLERK

No. 14-1175

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 10, 2015

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CONSITUTION

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INTEREST OF *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

This case directly impacts the interests of *amici* and their members. States, as well as their agencies and municipalities, are increasingly burdened by the threat of litigation for the various discretionary functions they exercise. In particular, the past few decades have seen a momentous rise in the need for States and municipalities to engage in interstate travel and commerce to fulfill these various roles, from contracting with out-of-state corporations for

road equipment to making taxation decisions in light of an increasingly mobile and global citizenry.

To protect against the increasing risk of litigation in this environment, States and municipalities have traditionally relied on governmental tort immunity, waiving such immunities only in limited instances. Principles of comity and sovereign respect have regularly supplanted where those traditional immunities lay bare before a foreign state tribunal.

This delicate framework has been upended, however, by the Nevada Supreme Court's decision to refuse to extend equal treatment to a foreign state agency subjected to litigation in a Nevada court. The court's refusal to extend even Nevada's own state immunities threatens core constitutional principles of equal protection and state sovereignty and threatens to saddle *amici* and their members with unpredictable and unsustainable litigation costs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Nevada Supreme Court's holding—that, in the context of litigation by a Nevada resident, the State of Nevada may purposely treat a California government agency worse than a similarly-situated Nevada government agency—offends a core structural principle of the Constitution: that the States enjoy *equal* sovereignty. That principle is grounded in the Full Faith and Credit Clause, and follows from the guarantees of equal protection in the Equal Protection and Privileges and Immunities Clauses of the Constitution.

The Nevada Supreme Court's decision violates that principle of equal sovereignty, and for a basic reason: Nevada may not purposely place California in a class

of litigants who must be treated worse than other, similarly-situated litigants. In sanctioning this State vs. State discrimination, the Nevada Supreme Court's decision flouts the constitutional provisions that undergird the equal state sovereignty principle. In particular, it violates the Full Faith and Credit Clause and tramples its closely-related concepts of interstate comity and cooperative federalism; and it violates the antidiscrimination principle rooted in the Equal Protection and Privileges and Immunities Clauses, *i.e.*, that equal state sovereignty prohibits States from intentionally discriminating against certain classes of litigants, particularly when those litigants are their sister States.

These constitutional problems are amplified by the many practical burdens that the Nevada Supreme Court's ruling imposes on local governments: by opening the gates to continuous litigation about government policy decisions, the lower court's ruling virtually guarantees obstruction of the smooth functioning of State and local government; it creates a constitutionally-sanctioned incentive for plaintiffs to forum shop for favorable jurisdictions; it imposes litigation risks on State and local governments that are difficult to manage and unpredictable; and it ensures that those governments face substantial costs in having to defend against even a few of these types of suits, quickly burning through public dollars.

Rather than carve exemptions into the Constitution's antidiscrimination protections and impose potentially existential costs on State and local governments, this Court should reverse the ruling of the Nevada Supreme Court and hold that Nevada may not withhold, in a disparate manner, its statutory damages cap from a California agency sued in a Nevada court.

ARGUMENT

I. THE PRINCIPLE OF EQUAL STATE SOVEREIGNTY PRECLUDES ONE STATE FROM DISCRIMINATING AGAINST ANOTHER IN THE MANNER PRESENTED IN THIS CASE.

This case presents a relatively straightforward question of disparate treatment, albeit in an atypical context: may a State withhold from one litigant a protection that all other similarly-situated litigants enjoy in the courts of that State?

The answer is and must be "no" under a long line of rulings from this Court addressing the rights and immunities that must be afforded litigants under the Constitution. The Nevada Supreme Court nevertheless answered "yes" in this case, holding that the State of Nevada may deny to a California agency the protection of a statutory damages cap that a similarly-situated Nevada agency would be entitled to claim. The rationale the court gave for this extraordinary ruling is nothing more than bare-knuckled discrimination: because the defendant in this case is a *California* government entity, it is not entitled to the protections that the same entity would receive if it were a creature of the *Nevada* bureaucracy. That ruling is wrong and this Court should correct it by holding that Nevada may not withhold from its sister States—either by effect or by design—legal protections that Nevada itself enjoys when sued in a Nevada court.

A. The Full Faith And Credit Clause, Reinforced By Principles Of Comity And Cooperative Federalism, Requires States To Grant The Same Rights And Immunities To Sister State Agencies And Municipalities As Its Own.

The constitutional principle of full faith and credit demands that the States respect not only the judgments of other States but also their status as co-equals in a nation of individual sovereigns. Similarly, States must also grant the same rights and immunities to other State agencies and subdivisions as enjoyed by the forum state in its own courts. This principle is backed by the language of the Full Faith and Credit Clause and reinforced by principles of comity and federalism. The Nevada Supreme Court flouted this principle by holding that a California agency is not entitled to the protection of a Nevada statutory damages cap when sued in Nevada court.

1. To begin, the Full Faith and Credit Clause of the Constitution mandates that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. Centrally, this Clause requires the States to afford equal recognition to judgments rendered in other States. In this respect, "the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

Though a State is not bound to apply other States' statutes in the same manner, it *must* provide equal recognition to other States' judgments, even if they

are founded on statutory immunities that the State would otherwise not apply in its own courts. See *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943). By requiring states to recognize each others' judgments, the framers "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others . . . ." *Id.*

The Full Faith and Credit Clause also requires the States to respect each others' status as co-equal sovereigns. See *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 499 (2003). Indeed, this Court explained that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* As a State considers the sovereignty interests of other States, it is of course not required to afford other States or municipalities *greater* protections than it would to itself. However, a State runs afoul of the Full Faith and Credit Clause where it offers *lesser* protections to sister States and municipalities than those enjoyed by the forum State's own government. Doing so "exhibit[s] a 'policy of hostility to the public Acts' of a sister State," particularly where the issue of governmental immunities is concerned. See *id.* (quoting *Carroll* v. *Lanza*, 349 U.S. 408, 413 (1955)).

2. In *Hyatt I*, this Court previously considered the contours of the Full Faith and Credit Clause and the extent to which Nevada was required to extend California's immunities to a California agency. 538 U.S. at 494. The Court ultimately concluded that Nevada was not required to apply California's statutory immunities, as "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing

with a subject matter concerning which it is competent to legislate.'" *Id.* at 494 (quoting *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722 (1988)).

This Court's ruling was premised on a key observation—that the Nevada Supreme Court had exhibited no "policy of hostility" toward the public acts of California in its decision, instead "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis" and "sensitively appl[ying] principles of comity with a healthy regard for California's sovereign status." *Id.* at 499. Indeed, in fulfilling the demands of the Full Faith and Credit Clause, the Nevada Supreme Court had extended the *same* immunity to the California agency as applied to Nevada agencies. And it had reviewed the sovereign immunity statutes of both States, considering also California's sovereignty concerns in deciding whether to grant immunity as a matter of comity.

In the instant case, this Court is asked to resolve a related question, at the other end of the spectrum—not whether Nevada must extend *California's* state immunities (which are decidedly more protective), but rather whether Nevada may refuse to extend its *own*, less-protective immunities to foreign state agencies haled into its courts. In refusing to extend its own immunities to a California agency, the Nevada Supreme Court departed from its previous approach, failing to recognize California's status as a co-equal sovereign and declining to use its own immunity as a "benchmark for its analysis."

While the lower court acknowledged in passing the need for comity, it then disregarded that principle entirely. In particular, the Nevada Supreme Court's approach openly exhibited hostility towards California's public acts. Whereas in *Hyatt I* the

Nevada Supreme Court at least *considered* California's immunities, ultimately applying its own as a "benchmark for its analysis," in the instant case the Nevada Supreme Court disregarded Nevada immunities altogether, refusing to extend the same $25,000 cap on damages enjoyed by Nevada's own agencies.

The Nevada Supreme Court's approach also violates the command of the Full Faith and Credit Clause to respect the status of other States and their agencies as co-equal sovereigns. In its decision, the Nevada Supreme Court stated that its policy of "providing adequate redress to Nevada citizens" was paramount and that this interest overrode its interest in extending the state's cap on damages as a matter of comity. Pet. App. 45. The need to "provid[e] adequate redress" is, of course, a policy interest for every state, including Nevada. But the Nevada legislature already addressed this concern by waiving its immunity from suit in the case of intentional torts, subject to a $25,000 cap on damages. By disregarding these limits in instances where suit is brought against another State or agency, the Nevada Supreme Court openly disregarded the sovereignty concerns of other States, like California, who have likewise addressed the issue of immunity through their own statutory scheme.

The Nevada Supreme Court was bound to extend the same treatment to California agencies as enjoyed by Nevada agencies in Nevada courts. Had it provided this same treatment, the Petitioner would be subject to, at most, a damages cap of $25,000 for intentional torts. Accordingly, this Court should reverse the Nevada Supreme Court's decision and hold that States must extend the same rights and

immunities to sister States and agencies that the forum States themselves enjoy in their own courts.

B. Principles Of Equal State Sovereignty And Interstate Antidiscrimination Require Equal Treatment For Sovereign States And Municipalities Facing Suit In A Sister State.

The Full Faith and Credit Clause creates a constitutional structure of equal state sovereignty, see *supra*; that structure is reinforced and informed by the antidiscrimination principles underlying the Equal Protection and Privileges and Immunities Clauses. See U.S. Const., amend. XIV, § 1; U.S. Const., art. IV, § 2. The synergy between these three constitutional provisions explains, in part, why interstate comity, a principle that sounds in full faith and credit, is violated when States discriminate by affording lesser protections to other States and municipalities. *E.g.*, *Milwaukee Cty.* v. *M.E. White Co.*, 296 U.S. 268, 272 (1935); *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981).

The Equal Protection and Privileges and Immunities Clauses are well-established in this Court's jurisprudence. The former generally requires that government classifications be supported by a rational basis, *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), while the latter asks whether a State's discriminatory conduct is related to a "legitimate interest." *Saenz* v. *Roe*, 526 U.S. 489, 507 (1999).

Thus, absent a valid justification, Nevada may not create disparate classes of litigants by singling out certain individuals and entities for lesser protection in Nevada courts. Such conduct offends the

fundamental "principle that all States enjoy equal sovereignty." *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). This Court should reaffirm the principle of equal state sovereignty, as informed by these interlocking constitutional provisions, and reverse the ruling of the Nevada Supreme Court.

That ruling violated the antidiscrimination principle when it ruled that the defendant California agency—*because* it is a California entity—is not entitled to the benefit of a Nevada statutory damages cap. Whatever debate may be had about the extent to which one State may be sued in the courts of another State, and to what degree they are required to enforce judgments secured in other States, it is a fundamental precept of the Constitution that a State may not deny to one litigant the equal protection of its own laws. Yet that is precisely what Nevada has done here.

The Nevada Supreme Court attempted to justify its decision on grounds of political accountability, explaining that—in its view—because a Nevada resident injured by a California agency cannot hold that agency accountable through the political process, withholding the Nevada statutory damages cap for this particular litigant is an appropriate substitute.

But the defendant's status as a non-Nevadan government entity does not make it less deserving of equal protection. Indeed, the opposite is true: States, due to their sovereign status, are owed "special solicitude" in litigation, *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007), and must as a result *at the least* be accorded the same rights and immunities as similarly-situated litigants. The Nevada Supreme Court's holding that a California government entity should be treated worse than a similarly-situated Nevada entity sued in a Nevada court flies in the face

of this principle, as well as the constitutional precept that the Republic "is a union of states, *equal* in power, dignity, and authority," *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911) (emphasis added).

The requirement of equality amongst the States has been highlighted most often in cases involving the States' relationship with the federal government. *Shelby Cty.*, 133 S. Ct. at 2623–24. This concept is clearly not, however, relevant only in this context. The principle of equality of sovereign status necessarily encompasses a requirement that the States and their localities respect *one another's* equal sovereignty. That equality can constrain a State's sovereignty is not a novel idea: the guarantee of equal treatment have been recognized to, for example, forbid States from discriminating in favor of their own residents by burdening the residents of another State. *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869, 878 (1985). In other words, the Constitution already recognizes a limit, grounded in antidiscrimination, that prohibits each State from exercising its sovereign power in a way that would upset the system of equal state sovereignty.

What this case demonstrates is that protection of the States' equal sovereignty must incorporate a principle of interstate equality, and concomitantly, a prohibition on interstate discrimination. That makes sense. A constitutional structure that protects the equality of the States' sovereign status *only* vis-à-vis the federal government would render the principle of equal state sovereignty meaningless: it would effectively collapse it into federalism.

But the concepts are distinct. The rationale that underlies the requirement of interstate equality is not federalism, but rather preservation of "the harmonious operation of the scheme upon which the

Republic was organized," *Shelby Cty.*, 133 S. Ct. at 2623 (quoting *Coyle*, 221 U.S. at 580). Given that rationale, it would make little sense to guard vigorously against the federal government's disparate treatment of the States, but turn a blind eye to the same type of conduct perpetrated *by* the States (or their localities) against one another. Both are capable threats to the "harmonious operation" of the Republic's structure of government, and both offend the premise that the States enjoy equal sovereignty. Both are, therefore, deserving of this Court's scrutiny.

This Court has previously recognized the threat interstate discrimination poses to the harmonious operation of the Republic. It held in *Saenz*, 526 U.S. at 500–07, for example, that a State may not withhold benefits to individuals who relocate to that State simply because those individuals were previously residents of another State that did not offer the same generous benefits. While that decision cited the constitutional right to travel amongst the States, *id.* at 500–01, it was premised on the underlying principle that a State may not discriminate against a class of litigants merely because they hale from a different State. Without that guarantee of equality of privilege, "the Republic would have constituted little more than a league of states" and "would not have constituted the Union which now exists[.]" *Id.* at 502 (quoting *Paul* v. *Virginia*, 8 Wall. 168, 180 (1868)).

The Nevada Supreme Court's decision rebuked all this. Its ruling that a California agency is not entitled to the protection of a Nevada statutory damages cap that a Nevada agency would be entitled to in the same circumstances violates the principle of interstate equality. Pet. App 40-45. It places

California's sovereign status at a lower place relative to Nevada. That "departure from the fundamental principle of equal sovereignty requires a showing that" a State's disparate treatment of another State is sufficiently related to its legitimate justification. *Nw. Austin Mun. Util. Dist.* v. *Holder*, 557 U.S. 193, 203 (2009).

The Nevada Supreme Court's analysis fails this test. It ruled that a California agency should be exposed to greater liability than a similarly-situated Nevada entity because (1) a Nevadan has an interest in obtaining redress when injured, and (2) that redress interest is appropriately satisfied through lifting the damages cap because a Nevada resident cannot use the California political process to hold the California agency accountable. Pet. App. 41-45.

That proffered justification is illegitimate. It presumes that it is Nevada's responsibility to enhance its citizens' ability to sue foreign agencies and municipalities, but that interest is nothing more than dressed-up hostility towards another State. If Nevada were truly interested in providing complete compensation to Nevadans wronged by government conduct, then it would waive its own sovereign immunity in every case and lift the damages cap completely, including for Nevada government agencies. If, alternatively, Nevada is particularly concerned with providing to its residents injured by another State an adequate substitute for political accountability, it may negotiate with California an agreement to resolve these types of disputes or create a reciprocal arrangement whereby residents of each State are entitled to certain protections or a dispute resolution process.

But making the stakes limitless for a California tax agency sued by a Nevada resident in a Nevada court

with a Nevada judge presiding and a Nevada jury deciding the damages number is not about redress or political accountability. Stripped down to its true form, the Nevada Supreme Court's supposed interest in redress for its citizens is actually just an interest in helping Nevadans claw as much money as possible from a (likely unpopular) California tax agency. That is patently insufficient for purposes of constitutional review.

The other component of the Nevada Supreme Court's analysis—that the absence of recourse to the political process necessitates no cap on damages—is an ill-fitting means for an illegitimate end. As an initial matter, the irony of this logic is palpable: If a Nevadan should be entitled to limitless damages against California because he or she does not have recourse to the California political process, then California should similarly have some protections as a defendant in Nevada given that it similarly has no constituency in the Nevada political process. At minimum, the Nevada Supreme Court should not be able to blow a specially-created California-sized hole in its immunity provisions merely because California is a foreign state with no voice in Nevada's political process.

In any event, even assuming that Nevada has a valid interest in "redress," the question in this case is not whether Nevada residents should have a method of obtaining redress when they are injured by another State's government agency. Rather, the question is whether *limitless* damages—stretching, as in this case, into the millions of dollars—bears a substantial relationship to Nevada's proffered goal of providing a method of redress for its residents injured by an out-of-state agency or locality. The answer to that is obviously "no." Limitless damages is a wildly

overbroad solution to the (minor) issue of what a Nevada resident may do to hold a California agency accountable for alleged misconduct.

* * *

The Full Faith and Credit Clause requires equal state sovereignty, *i.e.*, States must grant to their sister States and municipalities the rights and immunities they would enjoy in the same circumstance. That premise is built upon the closely-related principles of comity and cooperative federalism, and it is reinforced by the antidiscrimination principle embedded within the Equal Protection and Privileges and Immunities Clauses. The Nevada Supreme Court's decision eschews equal state sovereignty and interstate antidiscrimination in favor of a type of immunity protectionism. Its decision should be reversed and this Court should instead hold that the principle of equal state sovereignty requires that Nevada treat the agencies of its sister States in the same manner as it would treat itself in the same situation.

II. FAILING TO EXTEND EQUAL TREATMENT TO SISTER STATES AND MUNICIPALITIES UNDERMINES THE EFFECTIVE FUNCTIONING OF GOVERNMENT.

The ruling below not only deviates from well-settled constitutional doctrine, it also poses a serious threat to the functioning of State and local governments. Where basic immunities are not afforded—particularly to municipalities—the effects can be immediate and destructive.

The possibility of another State court having jurisdiction to decide lawsuits involving foreign States and local governments isn't theoretical. As most States share a number of borders with other

States and numerous cities large and small are located on these borders, it is all but inevitable that a State or local government will be sued in another State for an incident taking place within that other State's borders. For example, the Arkansas police officers in *Plumhoff* v. *Rickard*, decided just two terms ago, were sued in Tennessee for a shooting that took place in Tennessee after officers were led on a high speed chase that crossed state lines. 134 S. Ct. 2012 (2014).

Where immunities are not afforded in this environment to foreign States and local governments, serious problems result. *First*, the Nevada Supreme Court's approach encourages forum shopping. It invites litigants—including plaintiffs from outside the State—to bring to their courts all lawsuits against out-of-state government litigants. A plaintiff who could conceivably bring his or her suit in a court that will sidestep immunities or damages caps has no incentive *not* to pursue litigation in that court, particularly where the court has signaled its willingness to suspend the standard rules of litigating against the governments of other States.

That is indeed exactly what occurred here. The plaintiff in this case sued a California entity in Nevada because courts in California would not have afforded him damages, and certainly not on the scale he obtained from litigating in Nevada. Similar forum shopping is easy to foresee in instances where plaintiffs ostensibly have the choice of dozens of jurisdictions in which to bring suit. See *Comptroller of Treasury of Md.* v. *Wynne*, 135 S. Ct. 1787 (2015) (taxpayer claiming credit for taxes paid in 39 states).

This approach, if approved by this Court, may trigger a race-to-the-bottom among States and courts across the Nation. States may be induced to adopt—

perhaps even by legislation—rules mandating disparate treatment of out-of-state agencies. There is no "California tax agency" constituency in Nevada. It is therefore conceivable that Nevada might, for instance, enact a statute compelling courts within Nevada to deny out-of-state agencies (or even other state citizens) the rights and privileges accorded to agencies of Nevada. That result would seem to clearly conflict with this Court's case law, but it is no different in practical impact than what the Nevada Supreme Court achieved through its ruling.

The inevitable result would be that one State or a few will become havens for litigation against State and local governments across the country. Indeed, if such a haven State exists, then a citizen of another State may be induced to bring suit against an agency of *his or her own* State in that other State if the citizen can thereby evade immunity or other restrictions. Beyond the flagrant violation of state sovereignty this would represent, it would render States and localities effectively unable to protect or administer their own interests, as they would potentially always be subject to suit in another State regardless of the rights and immunities conferred by their own statutes.

Second, a lack of equal treatment creates unpredictable risks of liability in other jurisdictions. Under the approach established by the Nevada Supreme Court, States and municipalities now have to anticipate the potential imposition of limitless damage caps, whereas States have routinely relied on governmental immunity statutes that protect the public fisc except in very limited circumstances of waiver. Indeed, even if a locality canvassed the country to ascertain the immunities and privileges that each State accords to its agencies and localities

(an enormous and likely unachievable enterprise), that body could still not be sure of its potential liability, as those other courts could in any decision–perhaps for any reason—deny immunity to that body.

This not only raises uncertainty, but could have immediate and concrete impacts on annual budgeting, future investments and planning, and insurance rates. Some agencies and localities may simply decline to take action, particularly if it would involve or impact a party who is from another State or if the affected party threatens litigation. Such baseless threats of litigation—which previously might have been properly ignored by an agency—may now be effective to preclude action.

Third, the resources required to defend against suits across various States could and likely would be exorbitant, and may even impede the effective functioning of government. These effects would be felt most acutely by municipal governments, where the cost to defend against suit in a foreign state alone poses an existential threat. Even the Nevada Supreme Court has recognized the potentially ruinous effects where no damages caps are imposed. *Cty. of Clark ex rel. Univ. Med. Ctr.* v. *Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (recognizing the "massive and deleterious effect upon state and local treasuries" were statutory damage caps to be expanded).

Aside from the potential cost of the judgment itself, these kinds of suits are by their very nature more expensive to defend, as they will proceed in the courts of another State. A California agency might, for example, be haled into a Rhode Island court—with no means to avoid the attendant expenses without exposing itself to an unfavorable judgment. In addition to the high costs associated with defending such suits, both in terms of travel expenses and lost

work, it could exponentially increase settlement pressures. The operation of State and municipal governments will be impeded in the process, as resources will be diverted away from basic services to settlement and litigation expenses.

* * *

Where basic immunities are not afforded, the functioning of State and local governments is placed in serious peril, as forum shopping would increase, the risks of litigation would become unpredictable, and the costs required to defend against these suits would become unsustainable. Accordingly, this Court should reverse the decision of the Nevada Supreme Court.

CONCLUSION

For the foregoing reasons, the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

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INTEREST OF AMICUS CURIAE

The South Carolina State Ports Authority ("South Carolina Ports Authority" or "Ports Authority") is an instrumentality of the state of South Carolina that owns and operates seaport facilities in Charleston and Georgetown, South Carolina, and an inland port facility in Greer, South Carolina, for the purpose of handling intermodal container freight.[1] The Ports Authority's infrastructure and operations support and promote the commerce of South Carolina, as well as the interstate and foreign commerce of the United States. The Ports Authority handles intermodal and other cargoes with origins and destinations throughout the nation. The Ports Authority and the state of South Carolina have committed billions of dollars in capital investment dedicated to port-related infrastructure.

As an arm of South Carolina, the Ports Authority is entitled to sovereign immunity. It is not subject to private suit without the State's consent in South Carolina state courts, *see* S.C. CODE ANN. § 15-78-20; federal courts, *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053-55 (4th Cir. 1995), *cert. den.*, 516 U.S. 987 (1995); and federal administrative tribunals, *Fed.*

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Petitioner filed a blanket consent to the filing of amicus curiae briefs, in support of either party or of neither party, with this Court on July 21, 2015. Respondent also filed a blanket consent to the filing of amicus curiae briefs, in support of either party or of neither party, with this Court on July 28, 2015. Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no one other than Amicus Curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002). The risk that the Ports Authority might be subject to private suits in the courts of other States, under this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), is antithetical to the interests of the Ports Authority and the state of South Carolina.

The Constitution of the state of South Carolina precludes the obligation of monies from its treasury, except in appropriations made by law, and authorizes the General Assembly to enact laws establishing the manner in which claims against the State may be made. *See* S.C. CONST. art. X §§ 8, 10. The General Assembly of South Carolina has not consented to private suits brought in the tribunals of other States. *See* S.C. CODE ANN. § 15-78-20(e). Thus, the Ports Authority has a strong interest in reversing *Hall* and protecting the full scope of the Ports Authority's immunity from unconsented suit.

SUMMARY OF ARGUMENT

Sovereign immunity protects the fiscal integrity of the public purse at both the federal and state level. In the U.S. Constitution, the power of the purse lies with the legislative (not the judicial) branch, since no public monies may be expended, except by and with the consent of the people's elected representatives in Congress. *See* U.S. CONST. art. I, § 9, cl. 7. This principle (that the legislature, not the judiciary, determines how government money is spent) is equally present in state constitutions, including the constitution of the state of South Carolina in effect at the time of the ratification of the U.S. Constitution. *See* S.C. CONST. of 1778 art. XVI. Importantly for the present case, this principle protects public

treasuries from liability arising from unconsented suits by individual citizens.

Sovereign immunity, therefore, is rooted firmly in the design and structure of the nation's constitutional system of government. In *Hans v. Louisiana*, this Court explained the principle of sovereign immunity as being one and the same for both the States and the United States, applicable regardless of the forum. 134 U.S. 1 (1890). Further, this Court has consistently recognized the sovereign immunity of the United States no matter what the forum. *West v. Gibson*, 527 U.S. 212 (1999).

In *Alden v. Maine*, 527 U.S. 706 (1999), and more recently in *Federal Maritime Commission*, 535 U.S. 743, this Court broadly affirmed the application of the principle of state sovereign immunity in forums beyond the federal courts. These decisions command but one answer to the third question presented by the Petitioner in this case. Sovereign immunity "does not turn on the forum in which the suits [are] prosecuted." *Alden*, 527 U.S. at 733. As such, States *must* retain their right to immunity from private complaints filed *not only* in federal district courts, federal administrative proceedings, and their own state courts, but also in the courts of other States.

The preservation of sovereign immunity today is essential to the orderly and efficient operation of government. The federal government and state governments are investing billions of dollars of public money in infrastructure. That investment entails potentially enormous exposure. With their sovereign immunity intact, the federal government and state governments can manage that exposure in a manner that promotes

the public interest in those investments. The court's decision in *Nevada v. Hall* undermines the States' ability to manage that exposure.

Therefore, *Nevada v. Hall* should be overruled.[2]

I. THE DOCTRINE OF SOVEREIGN IMMUNITY IS ROOTED FIRMLY IN THE CONSTITUTIONAL STRUCTURE.

A. The Framers Intended to Preserve the Sovereignty of the States Against the Suit of an Individual Regardless of the Forum.

To address the question of the scope of a State's sovereign immunity, the Court must first look to the original understanding of the Constitution as indicated by the views of the Framers. *See Alden*, 527 U.S. at 741; *Printz v. United States*, 521 U.S. 898, 910 (1997) (noting that the Framers' views are "usually regarded as indicative of the original understanding of the Constitution"). "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden*, 527 U.S. at 716. Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of

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[2] The Ports Authority submits this amicus brief to address the third Question Presented only. The Ports Authority does not take a position on the other question before the Court.

> every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . .

THE FEDERALIST NO. 81, at 529-30 (Alexander Hamilton) (New York: Modern Library, 1941). James Madison agreed: "It is not in the power of individuals to call any state into court." 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836) [hereinafter DEBATES], quoted in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 70 n.12 (1996), and *Hans*, 134 U.S. at 14. Echoing Madison, future Chief Justice Marshall also recognized: "It is not rational to suppose that the sovereign power should be dragged before a court." DEBATES, at 555, quoted in *Hans*, 134 U.S. at 14.[3]

> [The] cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution . . . . The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

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[3] "[T]his Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers." *Nevada v. Hall*, 440 U.S. at 436 (Rehnquist, J., dissenting) (citing *Edelman v. Jordan*, 415 U.S. 651, 660-62 (1974); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-30 (1934); *Hans*, 134 U.S. at 12-15).

Hans, 134 U.S. at 15-16. Therefore, "the States entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991).

At the time of the development of the Constitution, it was generally accepted that the States' sovereignty foreclosed suits against them brought in the courts of other States. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Com. Pl. 1781). Nothing in the Constitution, as finally proposed and ratified, changed that expectation. To the contrary, the proposition that the liberties and privileges of a citizen of one State guaranteed under the Constitution should allow that citizen to move freely to another State and then initiate suit against his former State is too untenable to be recognized. The Framers did not design the Union to be abused in that fashion.

In fact, the original constitutional plan contemplated a surrender of the States' sovereign immunity (in exchange for joining the Union) in only two circumstances. *Monaco*, 292 U.S. at 329. First, the States waived their immunity from suits brought by the United States. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965). And second, the States waived their immunity in suits brought by other States. *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

Despite the widespread understanding of the States' sovereign immunity, the Supreme Court in *Chisholm* held that Article III authorized a private citizen of South Carolina to sue the state of Georgia without its consent. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The outrage following the Court's decision provoked the almost-immediate ratification of the Eleventh Amendment. *See, e.g.*, C. WARREN, THE

SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926) (*Chisholm* "fell upon the country with a profound shock"), quoted in *Alden*, 527 U.S. at 720. History teaches "that Congress acted not to change but to restore the original constitutional design" in enacting the Eleventh Amendment. *Alden*, 527 U.S. at 722. Thus, the Eleventh Amendment reflects "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32 (1989) (Scalia, J., dissenting). The Eleventh Amendment, therefore, is not a source of state sovereign immunity; rather it is a remedial confirmation of it.

Even if one assumes that the Eleventh Amendment is a source of state sovereign immunity, as opposed to a remedial confirmation of it, allowing private suits in the courts of another State is incompatible with that immunity. It makes no sense whatsoever to allow a citizen of Georgia, for example, to file suit against the Ports Authority in state court in Georgia, but prohibit that same suit (in the first instance) in federal court. And because removal to a federal court can effect a waiver of immunity, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002), the Ports Authority is effectively denied its Eleventh Amendment immunity if it seeks the benefit of an impartial federal forum.

History is telling. The promise that the States would not be subject to suits at the hands of private citizens was integral to their ratification of the Constitution, thereby creating the Federal Government and granting it "few and defined" powers. *Gregory v. Ashcroft*,

501 U.S. 452, 457-58 (1991) (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (C. Rossiter ed. 1961)). The Framers' understanding of the doctrine of sovereign immunity, as applied to both the States and the United States, focused upon the "suability" of a sovereign, and not upon the forum in which the suit was brought. The constitutional debates certainly addressed Article III, but only because of the concern that Article III might subject non-consenting States to private suits. The idea that Article III granted such a power was rejected on the general understanding that the "suability of a state" by a private party "was a thing unknown to the law," *Hans*, 134 U.S. at 16, and the States' immunity would be preserved inviolate under the constitutional design, *Printz*, 521 U.S. at 918-19.

State sovereign immunity accords the States "the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760 (citing *In re Ayers*, 123 U.S. 443, 505 (1887)). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had *not been delegated to the United States*, should be summoned as defendants to answer the complaints of private persons.'" *Id.* (quoting *Alden*, 527 U.S. at 748) (emphasis added). The Framers' concern to avoid an "impermissible affront to a State's dignity" has led this Court to recognize, in other contexts, that state sovereign immunity extends beyond the federal courts. *See, e.g., id.* The same rationale must be applied to the operation of state sovereign immunity in the courts of other States.

Because private party suits in any forum against non-consenting States were "anomalous" and "unheard-of proceedings" at the time of the Constitution's adoption, *see Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18), this Court should presume that the States' immunity is preserved and that it protects the States from any and all such proceedings, regardless of the forum chosen by a private party. Further, the United States obtained its sovereignty from the States. Whatever principles are inherent in the federal government's sovereignty are necessarily inherent in the sovereignty of the States. *See Alden*, 527 U.S. at 749-50. Thus, if immunity principles preclude private complaints against the United States regardless of the forum, then the same must hold true for the States.

B. This Court's Jurisprudence Recognizes the Dual and Complementary Sovereignty of the States and the United States.

Against a historical backdrop that demonstrates the importance of the States' sovereign immunity to the founding generation, this Court has "recognized a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18). This Court has "often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 745. This Court also has recognized consistently that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *See, e.g.*, *Tafflin v. Devitt*, 493 U.S. 455, 458 (1990).

Thus, it is no surprise that since *Chisholm* was rejected by the Eleventh Amendment, this Court has consistently recognized the principle of sovereign immunity. Chief Justice Marshall recognized the application of sovereign immunity to the United States in dicta in both *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821), and *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834). Chief Justice Taney also recognized it in *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). In 1868, Justice Davis, writing for a unanimous Court in *Nichols v. United States*, explained the importance of the operation of sovereign immunity. 74 U.S. (7 Wall.) 122, 126 (1868).

This Court also has upheld the States' immunity in various contexts falling outside the literal text of the Eleventh Amendment. In *Hans*, the Court held that the Eleventh Amendment confirms that a citizen cannot sue his own State even though the express language of the Amendment only appears to prohibit suits filed against States by citizens of another State or of a foreign state. 134 U.S. 1. The plaintiff in *Hans* argued that the Eleventh Amendment only prohibits the federal courts from exercising jurisdiction over the States in diversity cases, but not in cases arising under the Constitution, laws, or treaties of the United States (*i.e.*, federal question jurisdiction). *Id.* at 9-10. The Court reviewed the history of the Eleventh Amendment and noted the "established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent." *Id.* at 17. The Court explained the sovereign immunity enjoyed by the States as congruent with that of the United States in the following terms:

> "It may be accepted as a point of departure unquestioned," said Mr. Justice MILLER . . ., "that neither a State *nor the United States* can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution."

Id. (internal citation omitted; emphasis added). Therefore, the Court found that adhering to the "letter" of the Amendment would not serve the doctrine of sovereign immunity embodied in the Eleventh Amendment. *Id.* at 15.

In *Seminole Tribe*, the Court considered whether Congress had the power to abrogate the States' sovereign immunity in the Indian Gaming Regulatory Act, passed by Congress under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. 517 U.S. at 47-53. Earlier in *Union Gas*, a plurality of the Court held that the Interstate Commerce Clause in Article I of the Constitution granted Congress the authority to abrogate the States' immunity. *Union Gas*, 491 U.S. at 19. This Court in *Seminole Tribe* revisited the issue of the powers granted to Congress under Article I with respect to the States' immunity. The Court overruled *Union Gas* and held that Article I does not authorize Congress to abrogate the States' sovereign immunity. *Seminole Tribe*, 517 U.S. at 63-73.

Even though the statute at issue in *Seminole Tribe* only authorized prospective injunctive relief, the Court held that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." *Id.* at 58. The Court recognized that a

State's sovereign immunity protects it not only from judgments paid out of its treasury, but also from the indignity of being hauled into court by a private party and having to defend itself. *Id.*

In *Alden*, the Court held that Article I does not grant Congress the authority to subject non-consenting States to private suits in their own courts. 527 U.S. at 712. In applying the doctrine of sovereign immunity to proceedings in state courts, this Court reasoned: "Private suits against nonconsenting States, however, present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' . . . *regardless of the forum.*" *Id.* at 749 (quoting *In re Ayers*, 123 U.S. at 505) (emphasis added). Significantly, the Court focused on the historical importance of the doctrine of sovereign immunity and not the forum in which it was asserted. *Id.* at 733 (sovereign immunity "does not turn on the forum in which the suits [are] prosecuted"). In analyzing the scope of the States' immunity, this Court expressly recognized that the United States enjoys sovereign immunity and that the States are "entitled to a reciprocal privilege." *Id.* at 749-50.

More recently, in *Federal Maritime Commission*, this Court affirmed that sovereign immunity precluded a federal administrative agency from adjudicating a private complaint against a non-consenting State. 535 U.S. 743. In that case, the Ports Authority noted that the sovereign immunity of the United States also precluded suit before a federal administrative agency. *See West v. Gibson*, 527 U.S. 212 (acknowledging that the sovereign immunity of the Federal Government applies in federal administrative proceedings). The Ports Authority asserted that the States were entitled to a "reciprocal privilege." *Alden*, 527 U.S. at 749-50.

Thus, when this Court considers the scope of the States' sovereign immunity, it honors the promise made to the States over 200 years ago and paints with a broad brush. *See Alden*, 527 U.S. at 745 (describing the States' sovereign immunity in "sweeping terms"); *Nevada v. Hall*, 440 U.S. at 438 ("When the State's constitutional right to sovereign immunity has been described, it has been in expansive terms.") (Rehnquist, J., dissenting). This Court's precedent establishes a tremendous respect for the sovereignty of both the United States and the States and makes no meaningful distinction between the two sovereigns when defining the scope and application of their sovereignty.

II. THE CONSTITUTIONAL STRUCTURE CONFIRMS THAT STATES ARE ENTITLED TO ASSERT THEIR SOVEREIGN IMMUNITY ON THE SAME TERMS AS THE UNITED STATES.

Both the United States and the States derive their immunity from the same source–the general understanding of the founding generation that a sovereign shall not be compelled to answer private suits against its will. While the Founders adopted this understanding from the English belief (memorialized by Sir William Blackstone) that the king was immune from suit, W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 241-44 (Thomas M. Cooley ed. 1872), it assumes a far greater significance under the constitutional design.

Just as the States are immune from private suits, this Court subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens*,

19 U.S. (6 Wheat.) at 411-12. Of course, the United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory v. Ashcroft*, 501 U.S. at 457 (recognizing that the States adopted the Constitution which "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers). Thus, to the extent that the United States enjoys the benefits of sovereign immunity, it is only because it acquired that attribute of sovereignty from the States.

The sovereign immunity of the federal government itself is beyond question, even though there is nothing in the Constitution that provides specifically for it. This sovereign immunity of the federal government is derived not from any specific provision of the Constitution, but rather by the structure of the instrument itself. It is "informed by separation-of-powers, considerations that reflect the Constitution's express conferral to Congress of the power of appropriations and property disposition." U.S. Reply Br. 18 n.10, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 2002 WL 221018 (U.S. Feb. 11, 2002) (No. 01-46). The Appropriations Clause of the U.S. Constitution states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. Similarly, the South Carolina Constitution in effect at the time of the ratification of the U.S. Constitution provided that "no money be drawn out of the public treasury but by the legislative authority of the State." S.C. CONST. OF 1778 art. XVI. Thus, the principle of sovereign immunity is inherent in the constitutional design, at both the federal and state levels. There was no contemplation that the principle of sovereign immunity might be subject to

abrogation by private suit against a non-consenting State in any forum, and thereby might surrender control of the public purse contrary to the Constitution.

The spectacle of both of the States involved in this case, California and Nevada, seeking reversal of *Nevada v. Hall* in separate petitions belies the notion that sovereign immunity is merely incidental to the constitutional design. *See* Petition for Writ of Certiorari, *Franchise Tax Bd. of Cal. v. Hyatt*, 2015 WL 1346455 (U.S. Mar. 23, 2015) (No. 14-1145); Petition for Writ of Certiorari, *Nevada v. City & Cty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073). Rather, sovereign immunity is essential to the constitutional objectives that are primarily informed by separation of powers principles, namely the legislature's exclusive control over the power of the purse.

Throughout history, this Court has consistently described the constitutional system of the United States as one of dual sovereignty. *See, e.g., Tafflin*, 493 U.S. at 458. This Court often intermingles the case law addressing the sovereign immunity of one when analyzing the immunity of the other. *See United States v. Lee*, 106 U.S. 196, 206-07 (1882) (in analyzing whether the United States enjoyed immunity, the Court relied upon Justice Iredell's dissent in *Chisholm*, which involved a State's claim of sovereign immunity); *The Siren*, 74 U.S. (7 Wall.) 152, 156 (1868) (relying upon a Pennsylvania state court case defining the scope of Pennsylvania's immunity to support the federal government's immunity in a similar context); *Hans*, 134 U.S. at 16 (in addressing the scope of the States' sovereign immunity, the Court relied upon opinions on the suability of the federal government).

Thus, this Court implicitly recognizes that the principle of sovereign immunity is a general protection afforded to the United States and the States on comparable terms. "It is obvious that in our system of jurisprudence, the principle [of sovereign immunity] is as applicable to each of the states as it is to the United States." *Lee*, 106 U.S. at 206. Thus, "[i]t may be accepted as a point of departure unquestioned, that *neither a State nor the United States* can be sued as defendant in any court in this country without their consent . . . ." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) (emphasis added). This is true because *"[e]very government* has an inherent right to protect itself from suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, *applies to every sovereign power* . . . ." *Nichols*, 74 U.S. (7 Wall.) at 126 (emphasis added). "It is a familiar principle that *all governments* possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court." *United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 182 (1870) (emphasis added).

Most recently, in *Alden*, this Court expressly stated that the States are entitled to assert their sovereign immunity on the same terms as the United States. 527 U.S. 706. In deciding whether the States enjoy immunity from suits in their own courts, this Court found it significant that the federal government enjoys immunity in its own courts. "In light of our constitutional system recognizing the essential sovereignty of the States," this Court recognized that the States are "entitled to a reciprocal privilege," *id.* at 749-50, thus granting the States sovereign immunity on the same terms as the United States enjoys its

immunity. This reciprocal symmetry is a recognition of the fact that the obligation of public monies is a legislative, not a judicial function, and that private suits cannot be prosecuted against a public treasury without consent. Therefore, as with the sovereign immunity of the federal government, the question of the forum in which a sovereign may be amendable to suit is properly a question of the terms of the sovereign's consent, and not the scope of the immunity itself. *See, e.g.*, 28 U.S.C. § 1491(a)(1).

III. THE PUBLIC'S INVESTMENT IN THE INFRASTRUCTURE OF THE NATION, WHETHER AT THE FEDERAL OR THE STATE LEVEL, IS ENTITLED TO THE PROTECTIONS AND BENEFITS OF SOVEREIGN IMMUNITY.

One of the public functions essential to the economic health of the nation is the investment in the infrastructure that the nation requires. In a challenging fiscal environment, it is critical that the nation be able to manage efficiently its public infrastructure investments, whether that investment is made at the federal or state level. The underfunding of transportation-related infrastructure has reached what has been described as a national "crisis." NAT'L SURFACE TRANSP. INFRASTRUCTURE FIN. COMM'N, U.S. DEP'T OF TRANSP., PAVING OUR WAY: A NEW FRAMEWORK FOR TRANSPORTATION FINANCE, Exec. Summ. (2009).[4]

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[4] *See also* ROBERT S. KIRK & WILLIAM J. MALLET, CONG. RESEARCH SERV., R42877, FUNDING & FINANCING HIGHWAYS & PUBLIC TRANSPORTATION (2015); ROGER C. ALTMAN, ET AL., THE HAMILTON PROJECT, DISCUSSION PAPER 2015-04, FINANCING U.S. TRANSPORTATION INFRASTRUCTURE IN THE 21ST CENTURY (2015).

For example, the federal government establishes, maintains, and operates a sophisticated air traffic control system for the benefit of air transportation services, in both interstate and foreign air transportation.[5] The potential exposure associated with these activities is enormous. The public's investment in and operation of that system is protected by the sovereign immunity of the United States, and it is managed through the enactment of limited and narrowly construed waivers of sovereign immunity. *See United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1991) (referencing the "traditional principle that the Government's consent to be sued 'must be construed strictly in favor of the sovereign' . . . and not 'enlarge[d] . . . beyond what the language requires.'") (internal citations omitted). Those protections are essential to the operation of the federal government and the orderly performance of its responsibilities.

The federal government, however, is not alone in providing the infrastructure necessary to support the commercial and economic interests of the United States. The States themselves share that function. For example, the state of South Carolina, through the Ports Authority, provides and operates port infrastructure for the benefit of both the interstate and foreign commerce of the United States. The Constitution of the state of South Carolina continues to vest in

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[5] The fact that these functions could also be performed by the private sector is of no moment. There have been many proposals to privatize air traffic control functions. *See* BART ELIAS, CONG. RESEARCH SERV., R43844, AIR TRAFFIC INC.: CONSIDERATIONS REGARDING THE CORPORATIZATION OF AIR TRAFFIC CONTROL (2015). Until these proposals become a reality, the function is entitled to the benefit of sovereign immunity.

its legislature the power of appropriations that is comparable to that of the U.S. Constitution. S.C. CONST. art. X, § 8. Further, it authorizes the General Assembly to direct by law in what manner claims against the State may be established and adjusted. S.C. CONST. art. X, § 10. Today, the legislature of the state of South Carolina manages the tort exposure related to its infrastructure and other activities in the same way Congress manages the exposure of the federal government, by enacting legislation establishing a limited waiver and consent to be sued. S.C. CODE ANN. § 15-78-10, *et seq.*[6] As such, the protection of sovereign immunity is as important to South Carolina's investment in its port infrastructure as it is to the federal government's investment in its own infrastructure.[7] In the ordinary course of port business, it is necessary for major public ports, including the Ports Authority, to have employees located in other states, raising the prospect of potential unconsented suit in those states. This Court's decision in *Nevada v. Hall* creates a loophole in a State's ability to manage that exposure that is

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[6] In fact, a majority of States manage their exposure to private suit through limited statutory waivers of their sovereign immunity patterned on federal laws like the Federal Tort Claims Act. *See* Nat'l Conf. of State Legislatures, *State Sovereign Immunity & Tort Liability* (Sept. 2, 2015, 12:18 PM), *available at* http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx.

[7] In this regard, the Supreme Court of the state of South Carolina generally recognizes the sovereign immunity of its sister States and the terms of their consents to suit. *See, e.g., Newberry v. Ga. Dep't of Industry & Trade*, 336 S.E.2d 464 (S.C. 1985) (non-consenting sister state could not be sued in tort in South Carolina); *Melton v. Crowder*, 452 S.E.2d 834 (S.C. 1995) (sister state was consenting state subject to suit in South Carolina).

neither consistent with, nor contemplated by, the framework of the U.S. Constitution.

CONCLUSION

At the time of the ratification of the Constitution, it was presumed that the States entered the Union with the principle of state sovereign immunity so well established that there was no thought that it could be altered without a specific clause in the U.S. Constitution to that effect. *Nevada v. Hall* and its conclusion that the Eleventh Amendment does not preclude suits against States in the courts of other States turns constitutional history on its head. It ignores the Eleventh Amendment's purpose–as remedial confirmation of the sovereign immunity of the States, rather than the source of such immunity. *Hall* is not only inconsistent with this Court's modern jurisprudence on the question of sovereign immunity, it is inconsistent with the historical record of the development of our republican constitutional system, and it is incompatible with the States' own expectations in the establishment of the infrastructure that is so important to their sovereign responsibilities. It is not, therefore, merely a reflection of a "settled doctrinal understanding" of the structure of the Constitution itself that confirms the sovereign immunity of the States, but also in recognition of the nature of the retained sovereignty of the States that, by and through their approval in the ratification process, made the U.S. Constitution, and our integrated Union, a reality.

For the foregoing reasons, and those set forth in Petitioner's brief, the Court should overrule *Nevada v. Hall*.

Respectfully submitted,

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No. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petitioner, California Franchise Tax Board (the FTB). In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court for the first time ruled that a state cannot assert its sovereign immunity against a suit brought in another state's court. As the case now before the Court demonstrates, such suits can readily disrupt critical state operations and processes, and generate conflicts among the states. The Commission has an interest in this case because *Hall* is a particular threat to the administration and enforcement of state taxes.[1]

The Commission was established by the Multistate Tax Compact in 1967. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978)(upholding

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Both parties to this action have filed blanket consents to the filing of *amicus* briefs.

the validity of the Compact).[2] The Commission promotes cooperation among states in the administration of taxes imposed on activities in interstate commerce by providing a forum for drafting uniform laws, conducting joint audits and training programs, and facilitating settlement of unreported taxes.

The Commission agrees with the FTB that *Hall* should be overturned. *Hall*'s holding, that states may not assert sovereign immunity in the courts of their sister states, is in conflict with more recent decisions of this Court, which recognize the principle that state sovereign immunity is essential to our constitutional structure. *See Alden v. Maine*, 527 U.S. 706, 728 (1999). The majority in *Hall* rejected this principle and instead analogized the relationship of the states to foreign independent sovereigns—observing that these foreign sovereigns lack the right to assert immunity in each other's courts. Of course, states are not independent sovereigns in that sense. Moreover, their interdependence ele-

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[2] The Commission is comprised of the heads of the tax agencies of states that have adopted the Compact. In addition to the sixteen compact members, thirty-two states are sovereignty or associate members. Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, and West Virginia. Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

vates, rather than detracts from, the importance of their inherent immunity. When determining whether a foreign sovereign is entitled to have its own law apply in a suit brought against it, the principles of comity are sufficient. But our federal system demands more.

The implications of *Hall*'s ruling denying states the right to assert immunity from suit may not have been entirely evident in the context of a simple tort case, where the sole conflict at issue before the Court concerned the recognition of that immunity. The implications of *Hall* are clearly more serious when, as in this case, the out-of-state suit relates to state tax administration and enforcement.

SUMMARY OF ARGUMENT

In rejecting the argument that states have immunity from suit in the courts of another state, the majority in *Hall* admitted that this left the protection of a defendant state's sovereign interests to the discretionary application of comity, *Hall*, 440 U.S. 410, 424-428, a doctrine referred to as "voluntary" by the Nevada Supreme Court in this case. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 493 (2003) ("*Hyatt I*")(quoting the unpublished table decision from *Franchise Tax Bd. of California v. Dist. Ct.*, 105 P.3d 772 (Nev. 2002)). But the dissenting opinions in *Hall* predicted that the failure to recognize state sovereign immunity would "place severe strains on our system of cooperative federalism," *Hall*, 440 U.S. 410, 429 (Blackmun, J., dissenting), and set the Court "adrift on uncharted waters..." (Rehnquist, J., dissenting).

The majority's decision in *Hall* may well have set the Court, and the states, adrift in the sense that such suits had never before been permitted. But these are not entirely *uncharted* waters. If states are to be denied immunity and treated, instead, as any other litigants when sued in the courts of their sister sovereigns, then we have ample precedent to predict the general course that such suits will take: states will regularly be subject to the jurisdiction of out-of-state courts due to their every-day tax enforcement activities, even if their agents do not venture beyond their borders. An out-of-state suit against the taxing state may include issues directly related to that state's enforcement or administration of taxes. In such a suit, the forum state will apply its own procedural rules, may apply its own substantive laws, and may decide what weight to give other public acts or documents of the defendant state. *See* Restatement (Second) of Conflict of Laws § 145 (1971).The decision of the out-of-state court will not be subject to review by the defendant state's courts, but will be entitled to preclusive effect in those courts under the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1.

In his dissent in *Hall,* Justice Rehnquist also predicted that "the ingenuity of our [legal] profession" would inevitably create pressure on the Court to limit that case's holding. 440 U.S. at 443. If the case now before the Court has not created sufficient pressure to overturn or limit *Hall*, it is inevitable that future plaintiffs and their lawyers, following the

course set here, will only increase that pressure.[3] Nor is it some abstract notion—the "dignity" of sovereign states—that is at issue, but the integrity of essential sovereign functions.

If cases such as this one multiply in coming years, it should come as no surprise, given the unpopularity of taxes generally, and the tendency of all plaintiffs, including taxpayers, to seek the most favorable forum. While such suits are rare in state courts, there have certainly been many attempts over the years to circumvent state court jurisdiction and bring state tax related suits in federal court, despite the doctrine of comity and the jurisdictional bar imposed by the Tax Injunction Act.[4] *See Hibbs v. Winn*, 542 U.S. 88, 104 (2004); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990); *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102 (1981).

Suits in state courts also raise a possibility that federal courts generally do not: the potential for conflicts between taxing-state and forum-state policies that might be resolved against the taxing state under choice-of-law rules. These differences may also isolate the forum state from any risk that the court's

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[3] This suit has already apparently encouraged other Nevada residents to file similar complaints, raising the prospect of similar litigation. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB).

[4] 28 U.S.C. § 1341.

ruling would set a precedent adversely affecting its own enforcement efforts. Here, for example, the Nevada court need not worry that holding the FTB to a certain standard will set a precedent for Nevada's own enforcement of income taxes, since Nevada has no income tax.

Finally, this case also represents a threat to the interstate cooperation essential to the administration and enforcement of taxes, which benefits both states and taxpayers generally. To the extent *Hall* permits policy differences between states to become persistent unresolved conflicts, these conflicts will interfere with the incentives for states to cooperate with and assist each other.

ARGUMENT

I. This case sets a course for future plaintiffs wanting to bypass, delay, and disrupt state tax enforcement—against which comity may prove insufficient protection.

This case, as well as other cases involving suits against states in out-of-state courts, charts a course for plaintiffs who wish to bypass, delay and disrupt the enforcement of state taxes.

A. Taxpayers may readily obtain jurisdiction over the taxing state in another state's courts.

While out-of-state taxpayers may have a greater opportunity to bring a suit against a taxing state in an out-of-state forum, it is not necessary for a plaintiff

to be a resident of another state in order to bring suit against the taxing state there. (Obviously, Mr. Hyatt's residency remains unsettled.) Neither is it necessary for the injury to have occurred in the forum state. *See Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), or for the taxing state to have sent its employees or agents into the forum state, or even if it has done so, for the actions in question to have been committed entirely in that state. *Erlich-Bober & Co. Inc. v. Univ. of Houston*, 404 N.E.2d 726 (N.Y. 1980); *County of Beaver v. Amarillo Hospital District*, 835 S.W.2d 115 (Tex. Ct. App. 1922). It appears the minimum contacts needed for a court of one state to acquire jurisdiction over another state can be shown by the general kinds of activities that states regularly engage in in administering and enforcing taxes. *See Hoskin Through Fleming v. California*, 812 P.2d 1068, 1071 (Ariz. 1990), citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); and *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005). Therefore, if a taxpayer resides or has a home in a state in which the taxing state makes contact with that taxpayer, or if the taxpayer has a business operation, conducts investment activity, maintains substantial records, or has other presence in the state with respect to which the taxing state is attempting to administer or enforce taxes, that location would provide a likely forum for a suit against the taxing state.

The same minimum contacts, or perhaps a little more, are also all that may be required for the court to assert the authority to apply its own law, entertaining specific claims recognized under that law. This case, if not reversed, would set a precedent that

a state court may have jurisdiction to hear all manner of intentional torts, and perhaps even negligence claims, against defendant states for acts committed in the course of an audit or other enforcement activity. Critically, a significant portion of the acts about which Mr. Hyatt complains, and for which judgment against the state was upheld by the Nevada Supreme Court, were clearly conducted outside the state. *See Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 144-145 (Nev. 2014). It is likely that at least some courts will also agree to take jurisdiction not just of tax-related torts, but of the related tax issues themselves. The district court in this case declined to consider the issue of residency in this case, but apparently only because the administrative proceeding in California had not yet concluded. *Id.* at 149. Moreover, even if the court wishes to undertake the task of segregating the defendant state's imposition of tax from related tort claims, out of respect for the taxing state or for other reasons, it is likely to be too difficult to do perfectly, as it was for the court in this case. *See id.* at 149-152.

B. A taxpayer may then use the out-of-state suit to interfere with, delay, and disrupt the specialized processes used for tax administration and enforcement.

It may go without saying that when a state is sued in an out-of-state court in a case involving tax issues, the court will apply its own procedural rules, bypassing the defendant state's own processes and procedures. *See Sun Oil Co. v. Wortman*, 486 U.S. 717

(1986). But what may be less obvious is how this rule may be exploited by plaintiffs bringing a suit against a state during the course of some tax-related administrative process, or how disruptive that may prove to be to tax administration and enforcement.

States, like the federal government, long ago determined that rather than having tax issues resolved in the district courts, specialized administrative processes, procedures, and forums were required. *See Abelleira v. District Court of Appeal*, 109 P.2d 942 (Cal. 1941); *Dep't of Taxation v. Scotsman Mfg. Co., Inc.*, 849 P.2d 317 (Nev. 1993). These processes ensure that revenue streams are protected, delays are avoided, and proper regulatory expertise is brought to bear on difficult questions. *See Perez v. Ledesma*, 401 U.S. 82, 127 n. 17 (1971)(Brennan, J., concurring in part and dissenting in part). This Court has recognized the essential role that specialized administrative processes typically play in tax enforcement, saying that "[a]ny delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows v. Chicago,* 11 Wall 108, 110 (1871); *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102 (1981).

Governments have made these specialized processes the exclusive remedy in tax matters through the explicit waiver of sovereign immunity. *U.S. v. Williams,* 514 U.S. 527, 531 (1995); *Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002). Governments also depend on exhaustion

of these administrative remedies. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989); and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006). In the federal government's case, of course, taxpayers cannot bring suit in state courts concerning issues of federal taxation. 28 U.S.C. § 1346(a)(1). *See also P.C. Monday Tea Co. v. Milwaukee County Expressway Comm'n*, 139 N.W.2d 26, 29-30 (Wis. 1966). The conflicts and difficulties this would cause are obvious.

Because states have developed specialized processes for administration and enforcement of taxes, they are bound by those processes and generally are required to follow them in order to obtain a final enforceable tax liability against a taxpayer. *See* CAL. REV. & TAX. CODE §§ 19044 and 21011. Accordingly, a plaintiff against whom a state has commenced some enforcement activity can obtain a distinct advantage by filing suit in an out-of-state court to delay the process used by the taxing state. Because states are prevented from asserting immunity, the court in which the suit is brought will have no choice but to consider the claims asserted and the taxing state will have no choice but to defend those claims. The issues may be sufficiently novel and complex that even preliminary matters would take time to resolve. An order granting or denying jurisdiction will likely be subject to interlocutory appeal, as it was here, creating further delay.

The plaintiff can also petition the trial court, as Mr. Hyatt did, to issue protective orders preventing the defendant state's use of important documents neces-

sary for any tax proceeding in that state.[5] The existence of an ongoing suit in a state will also ensure that the plaintiff has at least a reasonable basis for resisting informal requests for information or even subpoenas from the taxing state. So although the taxing state may institute administrative proceedings of its own in order to ensure that tax liabilities are established within statutory guidelines, those proceedings can be delayed not only by denying documents needed but by issuing subpoenas to officials and employees and requiring them to submit to depositions and other lengthy discovery as part of the out-of-state suit.

Note also that some critical rules, such as statutes of limitation, that might appear substantive in the context of tax administration because of their role in determining tax liabilities, have been held to be procedural. *Sun Oil*, 486 U.S. at 727-728 and *Sam v. Sam*, 134 P.3d 761 (N.M. 2006). *See also* Restatement (Second) of Conflict of Laws § 122 (1971).

C. Taxpayers may also identify conflicts of law or policy that can be exploited, and argue that the public documents of the defendant state are not entitled to weight in order to deflect or undermine the tax issues.

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[5] *Franchise Tax Bd. of California v. Dist. Ct.*, 105 P.3d 772 (Nev. 2002) (unpublished table decision), available at: http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=5165&csIID=5165&deLinkID=184207&sireDocumentNumber=02-05994.

Apart from any procedural issues, a state court exercising jurisdiction over a defendant state must also determine, under choice-of-law rules, whether it should apply the substantive law of the defendant state, or, if the forum state's law or public policy differs, whether that law should be applied instead. Either way, the court must have some understanding of the defendant state's law and its effect on the issues in suit. But unlike the law of torts, state tax laws can and do differ substantially in part as a result of a "healthy form of rivalry." *See Zobel v. Williams*, 457 U.S. 55, 67 (1982). This Court has also held that whether a state's own taxes are constitutional does not depend on what other states may or may not choose to tax, and therefore one state is not required to defer to the tax policies of another state. *See Comptroller v. Wynne,* 125 S.Ct. 1787, 1804 (2015); *Moorman v. Bair*, 437 U.S. 267, 280 (1978). Substantive tax law is not only unique to each state, therefore, it is often detailed and complex, with an extensive body of regulatory rules and other administrative guidance necessary to administer those taxes.

Under the best circumstances, it puts a heavy responsibility on an out-of-state court to understand a defendant state's substantive law when making choice of law decisions concerning tax related issues. Here, of course, California imposes an individual income tax, along with all of the concomitant substantive and procedural rules for such a tax, while Nevada does not. This appears the very kind of conflict in public policy that would entitle Nevada courts to defer to Nevada's own policy choices, if otherwise appropriate, in suits against another state. But even if

a Nevada court wished to apply California law, it would obviously have little experience with that law. Even the proper exercise of comity would appear to require a greater familiarity with the defendant state's tax law than a court in another state is likely to have.

But more important than the choice of law rules themselves, or the difficulties they present when taxes are involved, is the fact that a court's application of those rules will typically be reviewed under a very lenient constitutional standard. A court need not demonstrate that the forum state has the majority of the contacts with the matter at issue in order to apply its own law. For example, in *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) a California court was determined to have properly applied its own workmen's compensation law to an employee employed in and injured in Alaska, because the employment contract was executed in California. In *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), a Minnesota court was allowed to apply Minnesota law in a case concerning an out-of-state accident involving a nonresident employee. And, in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), this Court held that a Minnesota court could apply Minnesota law to a matter involving an out-of-state accident and the death of an out-of-state resident because, in part, the plaintiff (the decedent's wife) had moved to Minnesota after the accident occurred. *Id.* at 318-319.

Moreover, the fact that choice-of-law decisions may be unsound as a matter of conflicts law does not necessarily implicate the Full Faith and Credit Clause.

Id. at 323. (Stevens, J. concurring). For example, a court does not violate the Full Faith and Credit Clause if, in making a choice between competing substantive law, it merely misconstrues the law of another state. Instead, the mistake must be clear, must contradict an established interpretation of the law, and must be brought to the court's attention during the litigation. *See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) and *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914). In a suit against a state in an out-of-state court, the courts of the defendant state will have no opportunity to review the forum state's interpretation of its own law.

As this court reiterated in *Hyatt I*, the question is merely whether the forum state has adopted a "policy of hostility" to the laws of the defendant state. Therefore, states must assume that a forum state's choice to apply that state's law will be subject to change on review only where the forum state "has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence of the transaction." *Allstate Insurance*, 449 U.S. at 308 (1981). *Hyatt I*, 538 U.S. at 413. *See also Head v. Platte County*, 749 P.2d 6 (Kan. 1988)(holding that in a suit against a sheriff in Missouri for acts committed in Missouri against a Kansas resident that: "No state should give effect to the law of another on principles of comity when the effect would be deleterious to the public policy of the forum state.")

Plaintiffs may also attempt to persuade the out-of-state court to disregard the forum state's laws, regu-

lations, and rulings as well as other public acts or documents, such tax notices, assessments, etc., that would have substantial weight in the taxing state's own forum. If the court agrees to do so, that decision will typically be subject to review only under the most lenient of standards—abuse of discretion. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998)(holding that unlike the preclusive effect of a judgment, enforcement measures remain subject to the forum state's law); *Hyatt v. Franchise Tax Bd.*, 962 N.Y.S 2d 282 (N.Y. App. Div. 2013) (holding that the FTB's administrative subpoena was not entitled to full faith and credit and that a court may decline, under the doctrine of comity, to enforce a subpoena unless it conforms to the forum state's rules). Nor are administrative rulings of a state administrative forum, which is granted limited jurisdiction, entitled to preclusive effect in the same way as state court judgments. *See Thomas v. Washington Gas Light Company*, 448 U.S. 261 (1980)(holding that Full Faith and Credit principles do not apply to administrative agency rulings in the same way they would apply to state court judgments).

So even if the defendant state were to proceed through such an administrative forum to resolve the tax issue, the ruling might not be entitled to any effect in the out-of-state suit. Nor is this an insignificant problem for the states. At least thirty-three states have specialized tax tribunals to hear tax dis-

putes, separate from the state's courts of general jurisdiction.[6]

In contrast, whatever the court of another state ultimately decides, it will have the advantage of establishing preclusive effect for those issues. A defendant state will not ordinarily be able to refuse giving effect to a judgment against it issued by another state's court, provided the question of jurisdiction was fully and fairly litigated in that court. *Durfee v. Duke*, 375 U.S. 106 (1963)(holding that where a Nebraska court determined that it had jurisdiction over a suit to quiet title in land situated on the Missouri river, a federal District Court sitting in Missouri was not free to make a separate determination as to whether the Nebraska court had jurisdiction); and *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691 (1982) (holding that North Carolina could not deny enforcement of an Indiana court judgment even if it found the Indiana lacked subject-matter jurisdiction). *See also Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

D. While comity may limit suits against taxing states, as a discretionary doctrine, it is unlikely to prevent such suits, especially since there are strong countervailing incentives.

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[6] *See* AICPA Chart of States With and Without State Tax Tribunals (Current as of 10/14/2014), available at: http://www.aicpa.org/Advocacy/Tax/StateLocal/Pages/StateTaxTribunals.aspx.

The chief downside risk to taxpayers who choose to sue a taxing state in an out-of-state court in order to disrupt, delay, or otherwise bypass the taxing state's administrative and enforcement processes, is that the court may ultimately exercise its authority to dismiss the suit on comity grounds. When this risk is weighed against the potential benefits, it is likely to prove ineffective at protecting states from such suits, however. In this case, for example, Mr. Hyatt's suit has served to delay the state of California from reaching any final administrative decision as to his tax liability, after commencing an audit over twenty years ago. This suit also required California to expend considerable resources, which other states may lack, as well as time in litigation, and has made it difficult for California to obtain records and other evidence necessary for tax enforcement. As a result of the suit, Mr. Hyatt was awarded a judgment amounting to $490 million, and while this judgment has been substantially reduced, it sends a strong signal, and likely gives future plaintiffs undue leverage in dealing with defendant states. At the very least, states facing these kinds of suits will have little certainty as to how an out-of-state court will rule and this will undoubtedly give plaintiffs a substantial advantage, as well as an incentive to push that advantage.

II. Suits such as this one may create persistent conflicts between states which would interfere with the interstate cooperation essential to enforcement of state taxes.

In the context of state tax enforcement, cooperative federalism is not just an ideal, it is imperative. Regardless of the tax system or the diligence and effectiveness of tax administrators, there will always be a level of noncompliance. When such noncompliant taxpayers are outside a state's borders, this obviously complicates enforcement. Therefore, states are compelled to act together in order to minimize tax fraud and provide taxpayers with a reliable framework. This cooperation comes in many forms, including assistance in the enforcement of subpoenas to obtain the records (without which tax liability could not be determined) and the ability to domesticate and enforce judgments as to tax liabilities. *See Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935)(holding states may not deny full faith and credit to a judgment for taxes); the Interstate Depositions and Discovery Act[7]; and also the Uniform Enforcement of Foreign Judgments Act.[8] States also cooperate in other ways, including enactment of uniform tax laws; participation in alternative dispute resolution programs; coordination of tax credits; acceptance of foreign-state tax exemption certificates; reciprocal enforcement of tax liens; sales and use tax enforcement agreements; creation of guidelines for tobacco tax administration and enforcement; shared

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[7] National Conference of Commissioners On Uniform State Laws, Interstate Depositions and Discovery Act (2007), http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf

[8] National Conference of Commissioners On Uniform State Laws, Uniform Enforcement of Foreign Judgments Act (1964), http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf

audits; and uniformitization of electronic transmission standards. Cooperation is generally beneficial when administration of a tax requires outside information, when a new industry arises that requires a tax framework, or when multistate taxation may be too complex and burdensome for the taxpayer.

One of the most prominent interstate cooperative undertakings combines an effort to protect the states' treasuries with an effort to shield taxpayers from identity theft. Experts believe that, as the IRS implemented anti-fraud protections in 2015, identity thieves shifted their focus to state tax refund fraud.[9] One source estimated the shift resulted in a 3,700 percent increase in fraudulent state tax refund filings in some states.[10] As a result, forty-one states have joined the Federation of Tax Administrators' (FTA) Suspicious Filer Exchange of Information Program to combat fraudulent state tax refunds. Via the program, states provide information about known false filers and schemes—information sister states would otherwise never know until they had been defrauded. This shared outside information means that all of the states in the program are better positioned to identify and recover fraudulent state refunds.

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[9] *The Rise in State Income Tax Refund Identity Fraud: The True Challenges and New Ways to Combat it*, LexisNexis White Paper,
http://www.lexisnexis.com/risk/downloads/whitepaper/tax-refund-fraud-pov.pdf

[10] *Id.*

In another notable example of collaboration, a number of states realized in early 2000 that sales and use tax sourcing and collection would become a challenge as electronic commerce expanded. This is particularly true given the decision in *Quill v. North Dakota*, 504 U.S. 298 (1992), which determined that a seller cannot be compelled to collect sales tax without a physical presence in the taxing state. In the *Quill* opinion, this Court expressed concern that state tax structures were too complex to require an out-of-state seller to collect sales tax. Therefore, 44 states worked together to create uniform, simplified sales tax rules and definitions, along with a central registration system. To date, 24 states have passed conforming legislation.[11]

States also work together in order to simplify taxes that may otherwise be too complex or burdensome to the taxpayer. The International Fuel Tax Agreement (IFTA) is an agreement among all states and Canadian provinces, which allows a carrier to register and pay motor fuel road taxes in the carrier's home or base state for all participating jurisdictions. Prior to IFTA, each state had its own fuel tax system, and a truck needed tax permits for each state in which it operated.[12] Most states established "Ports of Entry" to issue permits and enforce tax collection, which was burdensome to the trucking industry and the

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[11] Streamlined Sales Tax Governing Board, *How many states have passed legislation conforming to the Agreement?* http://www.streamlinedsalestax.org/index.php?page=gen_3

[12] IFTA, Inc., *The History of IFTA*, http://www.iftach.org/Meetings/materials/2009/audit2009/013%20The%20History%20of%20IFTA%20and%20IRP.ppt

states. IFTA greatly simplified the process for tax administrators and taxpayers.

Interstate cooperation is a fragile thing, however. In the instances presented here, each participating state surrendered a small part of its taxing power—information, the potential to tax a broader base or administer taxes on its own terms—in exchange for overall benefit to administrators and taxpayers. If a taxing state must worry that its sister states' courts might assert the right to adjudicate its tax-related or enforcement matters, this will inevitably create conflicts that may also impact state cooperation.

CONCLUSION

No state can administer or enforce its taxes without regularly exposing itself to the jurisdiction of other states. *Hall*, therefore, opens up a whole new avenue for many aggrieved taxpayers to challenge state tax imposition or enforcement. These suits may readily serve to bypass, delay, and disrupt the highly specialized state-specific processes upon which each state relies on for tax administration and will inevitably create conflicts between the parallel proceedings in the taxing and the forum state. Principles of comity, even if properly applied, will not protect a state from having to expend significant resources to defend disruptive litigation. Ultimately, these suits also create conflicts between states that may undermine state-to-state cooperation and interfere with interstate tax enforcement efforts.

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In the Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT
OF NEVADA

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 43 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

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INTEREST OF *AMICI CURIAE*

Amici Curiae—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming, and the Commonwealths of Kentucky, Massachusetts, Pennsylvania, and Virginia—have a significant interest in the protection of the full scope of sovereign immunity that they enjoy under the Constitution, including immunity from suits in other States' courts. Sovereign immunity is an "integral component of that 'residuary and inviolable sovereignty' retained by the States," *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751–52 (2002) (quoting The Federalist No. 39) (internal citations omitted), and prevents the subjection of a State to "the indignity of . . . the coercive process of judicial tribunals," *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quotations omitted). In addition, because money judgments "must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), the loss of a State's constitutionally protected sovereign immunity saps the State of scarce resources needed

to pursue other goals. *Alden v. Maine*, 527 U.S. 706, 750–51 (1999).

INTRODUCTION

The time has come for this Court to overrule its decision in *Nevada v. Hall*, 440 U.S. 410 (1979), an outlier among this Court's consistent protection of the States' sovereign immunity. Although this Court has held that States are immune in their own courts, in federal courts, and in federal administrative agencies, *Hall* allows a State to be haled before the courts of any other State and be forced to pay money judgments issued by those courts. This affront to the States' sovereign dignity and financial resources is contrary to the Constitution's structure and history and should be definitively rejected. For this reason, a total of forty-five States have joined briefs arguing that *Hall* should be overruled. [1]

In concluding that States are not immune from suits in the courts of other States, the *Hall* majority disregarded both the structure and the history of the Constitution. 440 U.S. at 418–27. The Court specifically declined to "infer[]" immunity "from the

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[1] Forty-four States have joined this brief, but a total of forty-five States have joined briefs supporting Petitioners and arguing that States should be immune from suit in the courts of other States. The State of South Carolina is joining with its State Port Authority in another amicus brief in support of Petitioners in this case.

structure of our Constitution and nothing else." *Id.* at 426. And while the Court acknowledged that sovereign immunity was "[u]nquestionably . . . a matter of importance in the early days of independence," it determined the founding era history to be irrelevant because "[t]he debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III," and not on "the question whether one State might be subject to suit in the Courts of another State." *Id.* at 418–19. Similarly, the Court dismissed the understanding of immunity evidenced by the history of the ratification of the Eleventh Amendment because "all of the relevant debate[] concerned questions of federal-court jurisdiction." *Id.* at 420–21.

Having dismissed the best sources for an understanding of the scope of sovereign immunity implicit in the Constitution, *Hall* instead relied on the decision of this Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), to conclude that each State had the authority to choose not to extend immunity to other States. 440 U.S. at 416–18. *Hall* read *The Schooner Exchange* to stand for the proposition that sovereign nations can decide whether they will accord immunity to other nations. *Ibid.* Reasoning that the relationship between States resembles the relationship between nations, *Hall* held that only principles of comity prevented one State from being sued in the courts of another. *Id.* at 417–18, 421. But the Court admitted that this

rule would not have applied if it had found "a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418.

Hall also speculated that the States might be immune from suit in some cases but provided no clear guidance to identify those cases. The Court explained only that there could be some limitation where a suit in an out-of-State court poses a "substantial threat to our constitutional system of cooperative federalism," but did not elaborate further. *Id.* at 424 n.24.

The *Hall* decision prompted well-reasoned dissenting opinions by Justice Blackmun and Justice Rehnquist. Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, explained that "[t]he Court's expansive logic and broad holding—that so far as the Constitution is concerned, State A can be sued in State B on the same terms any other litigant can be sued—will place severe strains on our system of cooperative federalism." *Id.* at 429. Pointing to "[t]he prompt passage of the Eleventh Amendment nullifying the decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793)," Justice Blackmun reasoned that "the Framers must have assumed that States were immune from suit in the courts of their sister States." *Id.* at 430–31. Put another way, "[t]he only reason why this immunity did not receive

specific mention is that it was too obvious to deserve mention." *Id.* at 431.

Justice Rehnquist, joined by Chief Justice Burger, argued that the Court's decision "works a fundamental readjustment of interstate relationships which is impossible to reconcile not only with an 'assumption' this and other courts have entertained for almost 200 years, but also with express holdings of this Court and the logic of the constitutional plan itself." *Id.* at 432-35 (citing both the Eleventh Amendment and the founding-era decision in *Nathan v. Virginia*, 1 Dall. 77 (1781)). Justice Rehnquist also noted the irony of holding that States that are constitutionally immune from suits by other States' citizens in "neutral" federal courts could, under the majority's opinion, be haled into the more-likely-biased courts of their sister States. *Id.* at 442.

This Court's modern sovereign immunity case law demonstrates that *Hall* was wrongly decided, and that the dissenters were entirely correct. Specifically, this Court's post-*Hall* decisions require a searching examination of the Constitution's structure and history in order to determine the extent of the States' sovereign immunity, as that immunity was understood at the founding. *Alden*, 527 U.S. at 727–28. That analysis leads to the unmistakable conclusion that States are constitutionally immune from lawsuits brought in the courts of other States.

SUMMARY OF ARGUMENT

I. Under this Court's post-*Hall* case law, it is clear that the Constitution's structure extends the States' sovereign immunity to suits brought in other States' courts. As this Court has emphasized in recent years, see, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 723–24 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 70 (1996), the swift reversal of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), by the Eleventh Amendment highlights that the founding generation understood the Constitution's structure as broadly protecting the States' sovereign immunity. And it follows that States should also be immune from non-consensual suit in the courts of their sister States. Otherwise, the immunity implicit in the Constitution's structure would prohibit suits against States brought by other States' citizens in the more neutral federal courts, while nonsensically permitting those same out-of-state citizens to bring the same suits in their friendlier home-state courts.

II. "[H]istory and experience, and the established order of things," also strongly support the States' sovereign immunity from suits in other States' courts. *Alden*, 527 U.S. at 727 (quotations omitted). At the time of the founding, it was broadly accepted that the sovereign States were immune from lawsuits in *any* courts, including other States' courts. This view was most clearly demonstrated by the founding-era decision in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781), but is also clear from other founding-era statements and a leading treatise on

international law. While there was no specific debate among the Founders about the abrogation of the States' immunity in the courts of other States, the explanation of the *Hall* dissenters makes the most sense: such immunity was so well established that no one conceived it would be altered by the Constitution.

III. For the past thirty-five years, *Hall*'s error has imposed substantial harm upon the sovereign States. As detailed below, state courts have imposed financially burdensome judgments on other States and their agencies. Many of these cases involved intrusions into core areas of State policy, while all such cases violated the States' sovereign rights and dignities. The present case, in which a California state agency has been dragged through Nevada court for fifteen years, all for enforcing the State of California's tax policy, starkly illustrates the need for this Court to overrule *Hall*.

IV. Finally, at least two other considerations warrant overruling *Hall*. *First*, while the *Hall* majority suggested that another State's exercise of jurisdiction might be limited where there is a threat to Our Federalism, that hypothetical limitation fails to provide adequate protection. *Second*, the rule in *Nevada v. Hall* is not necessary to ensure that injured parties can seek relief because States can reach agreements consenting to suit in each others' courts.

ARGUMENT

I. THE CONSTITUTION'S STRUCTURE PROTECTS EVERY STATE'S SOVEREIGN RIGHT TO ASSERT IMMUNITY IN ITS SISTER STATES' COURTS

A. The States' immunity from suit inheres in the Constitution's structure. As this Court's recent decisions have repeatedly confirmed, the sovereign immunity of the States is implicit in "the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999); see also, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997) (explaining that a "broader concept of immunity" is "implicit in the Constitution"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (confirming that the Eleventh Amendment is important for "the presupposition . . . which it confirms" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))). This constitutional immunity is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713; see also *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) ("The Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework.").

Consistent with the view taken by Justice Blackmun's and Justice Rehnquist's *Hall* dissents,

this Court's modern sovereign immunity decisions have explained that this structural protection is most evident in the founding generation's reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Holding that a private citizen could sue a State in federal court, *id.* at 450–53 (Blair, J.); *id.* at 468 (Cushing, J.); *id.* at 461–66 (Wilson, J.); *id.* at 478–79 (Jay, C.J.), that decision "fell upon the country with a profound shock," *Alden*, 527 U.S. at 720 (quoting 1 C. Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)). In response and with almost unanimous votes after a single day of discussions, both Houses of Congress quickly approved the Eleventh Amendment, which provides that the power of the federal courts will not be construed to extend to a suit brought by a citizen of one State against another State. *Id.* at 721. The States promptly ratified the Amendment. *Fed. Mar. Comm'n*, 535 U.S. at 752.

As this Court's post-*Hall* decisions have explained, the "natural inference" from the circumstances surrounding the Eleventh Amendment's adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724. While the text of the Eleventh Amendment did not "codify[] the traditional understanding of sovereign immunity," *id.* at 723, this Court has recognized that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh

Amendment," *id.* at 713; see also *Seminole Tribe of Florida*, 517 U.S. at 70. Instead, the Eleventh Amendment points to "the broader concept of immunity, implicit in the Constitution." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267–68; see also *Fed. Mar. Comm'n*, 535 U.S. at 753 (acknowledging that "the Eleventh Amendment . . . is but one particular exemplification of [the States'] immunity"); *Blatchford*, 501 U.S. at 779 (confirming that the Eleventh Amendment is important because of "the presupposition of our Constitution which it confirms: that the States entered the federal system with their sovereignty intact").

B. For at least two reasons, the immunity implicit in the Constitution's structure includes immunity for States from suits brought in other States' courts.

First, this Court's post-*Hall* understanding of the Eleventh Amendment and the Constitution's structure would make little sense if States could be sued in the courts of other States without consent. If the immunity implicit in the Constitution requires broadly construing the Eleventh Amendment to prohibit all non-consensual suits brought against a State in federal court by a citizen of another State, it logically follows that States should also be immune from suit in the potentially biased courts of other States. U.S. Const. amend. XI. Otherwise, the States would have "perversely foreclosed the neutral federal forums only to be left to defend suits in the

courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting).

Second, several constitutional provisions evince a design by the founders to ensure the availability of a "neutral" federal forum for those cases in which a State is properly a party. *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting); cf. Amy Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 259–63. This Court has original jurisdiction over suits between two or more States. U.S. Const. art. III, § 2, cls. 1–2. And the federal courts have jurisdiction over consensual suits "between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. As recognized by Edmund Randolph, the first Attorney General of the United States, implicit in this design is the understanding that States have the right to assert immunity in the courts of other States. In his 1790 Report on the Judiciary to the House of Representatives, Randolph explained that the Constitution confirmed that the States would remain immune from suits in the courts of others States "by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 130 (Maeva Marcus, ed., 1992).

II. THE PRE-RATIFICATION HISTORY OF THE STATES' SOVEREIGN IMMUNITY MAKES PLAIN THAT THIS IMMUNITY EXTENDS TO SUITS BROUGHT IN ANY FOREIGN COURTS, INCLUDING STATE COURTS

A. "[H]istory and experience, and the established order of things" are also relevant to the scope of the States' sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). The States retain the immunity that they "enjoyed before the ratification of the Constitution . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. To determine the scope of the States' immunity, this Court has thus examined historical evidence, including "the ratification debates and the events leading to the adoption of the Eleventh Amendment," which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726.

Both before and after *Hall*, this Court has relied on ratification debates and other historical evidence to determine the scope of the States' immunity in a number of contexts not specifically addressed in those debates. *Alden*, 527 U.S. at 716–17. For instance, although the ratification debates focused on whether a State could be sued by *an individual*, this Court has relied on evidence of the understanding of immunity at the time of ratification to conclude that a State is immune from suits by federal corporations, *Smith v. Reeves*, 178 U.S. 436, 447–49 (1900), foreign

nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–32 (1934), and Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779–82 (1991). And although the ratification debates centered on the question of the States' immunity from suit *in federal courts*, this Court has relied on evidence of the understanding of immunity at the time of ratification to conclude that States are immune from suits in their own state courts, *Alden*, 527 U.S. at 741–43, and in federal administrative agencies, *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 754–61 (2002). *Hall*'s refusal to consider evidence of the understanding of sovereign immunity at the founding, as well as its dismissal of the ratification debates because those debates focused on questions of federal jurisdiction, cannot be reconciled with this approach. 440 U.S. at 418–20.

B. A review of the historical evidence reveals that the States' immunity from suit in the courts of sister States was assumed at the time of ratification.

Immunity from suit was an essential attribute of sovereignty at the founding. *Alden*, 527 U.S. at 714–15. Absolute immunity from suit in the absence of consent inhered in the nature of sovereignty under English law. *Ibid.* Blackstone, "whose works constituted the preeminent authority on English law for the founding generation," *id.* at 715, explained that "no suit or action can be brought against the king, even in civil matters, because no court can have

jurisdiction over him." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765). The leading treatise on international law at the time took the same approach, explaining that "[o]ne sovereign cannot make himself the judge of the conduct of another." Emmerich de Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 155 (Book II, Ch. 4, § 55) (J. Chitty ed., 1883).[2] This was accepted wisdom by the States at the time of the founding: "[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden*, 527 U.S. at 715–16.

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[2] James Madison relied on Vattel as an authoritative source of the law of nations, *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed., 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1111311113&sa=&r=36&sr=, and Thomas Jefferson explained that Vattel "ha[d] been most generally the guide" on the "law of nations," *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 7, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed. 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1311311113&sa=&r=96&sr=. Vattel was also cited in two of the State conventions to ratify the Constitution. 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 454 (hereinafter Elliot's Debates) (James Wilson citing Vattel at the Pennsylvania ratification convention); 4 Elliot's Debates 278 (Charles Pinckney explaining at the South Carolina ratification convention that Vattel was "one of the best writers on the law of nations").

Most relevant for the present case, the pre-ratification understanding of the sovereign immunity enjoyed by States extended to cases brought in the courts of their sister States. The decision of the Pennsylvania Court of Common Pleas in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781), is particularly instructive. In that case, a citizen of Pennsylvania sought to attach property of Virginia located in Philadelphia Harbor. *Id.* at 77–78. The Attorney General of Pennsylvania argued "[t]hat a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws." *Id.* at 78. The Pennsylvania Court of Common Pleas agreed, holding that Virginia was immune. *Id.* at 80.

Nathan was well-known at the time of the founding. While the case was pending, the Virginia delegates to the Confederation Congress, including James Madison, wrote a letter that argued for the dismissal of the case because it required Virginia to risk its property without appearing or to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), *reprinted in* 3 The Papers of James Madison 184 (William T.

Hutchinson et. al. eds., 1963).[3] The Virginia delegates explained that allowing the suit to proceed would be "derogatory to the Rights of Sovereignty of the State of Virginia." *Ibid.*[4] Later, the Attorney General of Virginia, Edmund Randolph, appointed John Marshall as one of two arbitrators, pursuant to a resolution of the Virginia General Assembly, to resolve the dispute between Virginia and Nathan after the Pennsylvania court dismissed Nathan's suit. 8 THE PAPERS OF JAMES MADISON 68 n.1 (Robert A. Rutland et al. ed., 1973).[5] And four years later, the decision of the Pennsylvania court to dismiss was published in the first volume of the United States Reports. 1 U.S. (1 Dall.) at 77.

Though there was no specific consideration of the question, statements during the ratification debates confirm that the States' immunity continued to be understood to include immunity from suit in the courts of other States. Advocates of the Constitution

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[3] This letter may be found at Founders Online, National Archives, http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=14&sr=.

[4] The delegates noted that even if Nathan could not bring his action in Virginia's courts, "still the Case would not be without Remedy; as on Petition to the Legislature, the supreme Authority of the State, it would no doubt be attended to, and redressed." *Ibid.*

[5] This source may be accessed at http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=38&sr=.

spoke in broad terms that presumed immunity in *all* courts, unless expressly surrendered, when they assured the people that the States would be immune from suit in federal court. Alexander Hamilton explained that immunity from the suit of an individual was "inherent in the nature of sovereignty." The Federalist No. 81, p. 486 (C. Rossiter ed., 1961). Hamilton went on to explain that immunity was "now enjoyed . . . by every State in the Union" and that unless "there is a surrender of this immunity in the plan of the convention, it will remain with the States." *Id.* at 487. James Madison assured the Virginia Convention that "[i]t is not in the power of individuals to call any state into court," and John Marshall assured that Convention that "[i]t is not rational to suppose that the sovereign power Should be dragged before a court." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 533, 555 (J. Elliot 2d. ed. 1836) (hereinafter Elliot's Debates).

Even the few Federalists who believed that Article III abrogated the States' immunity in federal courts shared the understanding that the States would still be immune from suit in the courts of sister States. One prominent supporter of permitting suits against States in federal court premised his argument on the continued immunity of States in the courts of other States. Edmund Pendleton argued to the Virginia Convention that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state[] shows

the propriety and necessity of vesting [a federal] tribunal with the decision of controversies to which a state shall be a party." 3 Elliot's Debates 549.

Attorney General Randolph's report on the judiciary to the House of Representatives—delivered shortly after the ratification of the Constitution—is yet more evidence that the States were understood to have retained immunity under the Constitution from suit in the courts of other States. Randolph believed the immunity of a State in the courts of another State to be as settled a principle as immunity of the United States itself from suits in state courts. "In like manner," he confirmed that "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 130 (Maeva Marcus, ed., 1992). He explained that the "unconfederated" States "would be as free from mutual control as other disjoined nations." *Ibid.* Nothing in the Constitution "narrow[ed] this exemption." *Ibid.*

This historical evidence demonstrates that *Hall*'s claim that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified," 440 U.S. at 418–19, is true in only one sense. "[T]he framers would not have thought such suits possible, and therefore were not worried that they would occur." Amy Woolhandler, *Interstate Sovereign*

Immunity, 2006 Sup. Ct. Rev. 249, 252. In short, "[t]he only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). As even *Hall* recognized, "the doctrine of sovereign immunity was a matter of importance in the early days of independence," and many States were concerned about being sued in the courts of another sovereign because they "were heavily indebted as a result of the Revolutionary War." 440 U.S. at 418. Given the "well-known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is [thus] most instructive." *Alden*, 527 U.S. at 741. The best explanation for the lack of specific debate about the abrogation of the States' immunity in the courts of other States is that this immunity "was a principle so well established that no one conceived it would be altered by the new Constitution." *Ibid.*

In fact, the question of a State's immunity in the courts of another State was so well understood from the time of the founding going forward that this Court's decisions prior to *Hall* routinely described the States' immunity in such terms. This Court explained in 1857 that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (emphasis added); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883)

(explaining that the States are immune from suit in "any court in this country"). In *Hans v. Louisiana*, this Court explained that "[t]he suability of a state, without its consent, was a thing unknown to the law." 134 U.S. 1, 16 (1890). And again in 1961, less than two decades before *Hall*, this Court explained specifically that state courts had "no power to bring other States before them." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961).

Even *The Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116 (1812), on which *Hall* relied, supports a broad historical understanding of the immunity of the States. In *The Schooner Exchange*, the Supreme Court explained that a sovereign exercises absolute territorial jurisdiction, and that any exceptions to such jurisdiction must be "traced up to the consent of the nation itself." 7 Cranch at 136. The Court further explained, however, that such consent may be implied from the common "usages and received obligations of the civilized world." *Id.* at 137. And those usages and obligations dictated that foreign sovereigns, foreign ministers, and foreign armies with a right of passage are all understood to enter territory on an implicit understanding that they will be immune from suit. *Id.* at 137–41. In *The Schooner Exchange*, the Court extended that understanding of immunity from jurisdiction to a French ship of war that had come into an American port under friendly circumstances. *Id.* at 145–46.

Hall's reliance on *The Schooner Exchange* was misplaced. It correctly read *The Schooner Exchange* for the proposition that States, like other sovereign entities, can expressly choose to grant immunity from the jurisdiction of their courts. It also correctly recognized that there may be other sources of immunity, such as "a federal rule of law implicit in the Constitution." *Hall*, 440 U.S. at 418. The mistake of the *Hall* majority was its failure to recognize the constitutional rule. As explained above, the historical understanding of the immunity retained by the States under the Constitution establishes that each State is constitutionally immune from suit in the courts of other States.

III. THE DENIAL OF THE STATES' SOVEREIGN IMMUNITY HAS IMPOSED SUBSTANTIAL COSTS UPON THE STATES AND THEIR CITIZENS

A. Limitations on the States' sovereign immunity "denigrates the separate sovereignty of the States." *Alden v. Maine*, 527 U.S. 706, 749 (1999). Sovereign immunity "accords the States the respect owed them." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Failure to accord this immunity subjects a State to "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties," *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)), and allows for "unanticipated intervention in the processes of government," *id.* at 750 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

This indignity is suffered "regardless of the forum," *Alden*, 527 U.S. at 749, though it is particularly harmful to permit a court from one State to subject another State to suit. An exercise of jurisdiction over a State by another State allows the courts of the second State to decide what policy goals the first State should pursue and how it should pursue those goals. These out-of-State suits "place an unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Id.* at 750–51. States can be "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests" in important areas of policy. *Ibid.* (quoting *In re Ayers*, 123 U.S. at 505). And the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, fisc, and policy priorities.

These harms occur whether a suit seeks to enjoin a State's policies or to recover a money judgment. States must use scarce resources to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political judgments must be made." *Alden*, 527 U.S. at 751. The imposition of a money judgment against a State's treasury diminishes the available resources by judicial fiat, and thereby undermines the State's ability to reach a "balance between competing interests . . . after deliberation by the political process established by the citizens of the State."

Ibid. In short, refusal to recognize the States' sovereign immunity from damage suits deprives the States of needed resources to pursue their own democratically determined objectives.

B. Since this Court's *Hall* decision, state courts throughout the country have imposed just such sovereign harms upon unconsenting States.

A number of state courts have exercised jurisdiction in cases that involve sensitive policy decisions of another State. For example, in *Faulkner v. University of Tennessee*, 627 So.2d 362 (Ala. 1992), the Supreme Court of Alabama held that Alabama courts would review the application of educational standards at a university operated by another State. A resident of Alabama sued the University of Tennessee for the withdrawal of a degree. After a faculty panel concluded that the student's dissertation did not meet the requirements for a doctorate, the student refused an administrative hearing in Tennessee and instead sued the University of Tennessee in Alabama state court. *Id.* at 363–64. The Alabama Supreme Court allowed the suit for money damages, injunctive relief, and declaratory relief to proceed, refusing to extend to the University of Tennessee the same immunity that an instrumentality of Alabama would receive. *Id.* at 364–66.

State courts have also permitted suits against other States based upon those States' law

enforcement policies. In *Head v. Platte County, Missouri*, 749 P.2d 6, 7–8 & 10 (Kan. 1988), a resident of Kansas sued a political subdivision and officer of Missouri for policies related to arrest warrants. The Kansas resident alleged that she had suffered injuries due to a failure by the Missouri entity to adequately train employees and a failure "to establish and implement policies concerning the filing and execution of arrest warrants." *Id.* at 8. The Kansas court decided to exercise jurisdiction based in part on the conclusion that "Kansas courts should give primary regard to the rights of its own citizens and persons within the protection of this state" instead of the sovereign interest of other States. *Id.* at 10. Similarly, in *Mianecki v. Second Judicial District Court*, 658 P.2d 422, 423 (Nev. 1983), the Wisconsin Department of Corrections permitted a sex offender on probation to move to Nevada. When the probationer committed a sexual assault, the victim sued Wisconsin for failure to warn and failure to supervise the probationer. *Ibid.* The Nevada Supreme Court explained that Nevada courts should review Wisconsin's supervision of the probationer because "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity." *Id.* at 425.

Finally, numerous money judgments have been entered against States or state entities by the courts

of other States. *Struebin v. Illinois*, 421 N.W.2d 874 (Iowa 1988), provides a particularly striking example. In that case, the Supreme Court of Iowa permitted two estates to sue Illinois for alleged negligent maintenance of a portion of interstate highway in Iowa that Illinois had agreed to maintain in an interstate compact. *Id.* at 875. An Iowa trial court entered two judgments against the State of Illinois totaling $118,800. *Ibid.* After the Illinois Court of Claims denied recovery on the judgment because recovery from the State was time barred under Illinois law, the Supreme Court of Iowa affirmed a garnishment of taxes owed to State of Illinois by an Illinois corporation with a plant in Iowa. *Id.* at 875–77; *Struebin v. Illinois*, 383 N.W.2d 516, 517 (Iowa 1986). The Iowa Supreme Court concluded that "garnishment of tax revenues is not an interference with Illinois' sovereign power to levy and distribute taxes" and that "there [was] no interference with Illinois['] sovereign power to tax." *Struebin*, 421 N.W.2d at 876; see also *Reynolds v. Lancaster Cnty. Prison*, 739 A.2d 413, 417 (N.J. App. Ct. 1999) (multi-million dollar verdict against a Pennsylvania prison); *Kent Cnty. v. Shepherd*, 713 A.2d 290, 304 (Del. 1998) ($600,000 judgment against the State of Maryland after an accident involving a deputy sheriff); *Laconis v. Burlington Cnty. Bridge Comm'n*, 583 A.2d 1218, 1220–23 (Pa. Super. Ct. 1990) ($1.75 million damages judgment against a subdivision of New Jersey in a case arising from bridge maintenance); *Hernandez v. City of Salt Lake*, 686 P.2d 251, 506–08 (Nev. 1984) ($225,000

judgment against a subdivision of Utah after an arrest and imprisonment).

C. This case—in which a California state agency has been subject to litigation in an out-of-State court for more than 15 years—is a case study in the harms imposed on States by the denial of immunity in courts in other States.

The Franchise Tax Board of California ("FTB") conducts audits to enforce California's income tax on its residents, and did so here after Gilbert Hyatt purported to move out of the State. Specifically, Hyatt filed a tax return with California in 1991 in which he claimed that he moved to Nevada and ceased to be a resident of California days before he received substantial patent licensing fees. Pet. App. at 4. Hyatt did not report the licensing fees on his tax return. *Ibid.* These discrepancies caused FTB to initiate an audit of Hyatt's 1991 tax return. *Ibid.* That audit concluded that Hyatt had not moved to Nevada until April 1992 but had staged an earlier move to avoid California's income tax for his patent licensing income. *Id.* at 6. FTB determined that Hyatt owed California $1.8 million in taxes from 1991 and added $2.6 million in penalties for fraud and interest. *Ibid.* A second audit found that Hyatt owed $6 million in taxes for 1992. *Id.* at 7.

Hyatt contested FTB's actions. But he did not limit that challenge to California's procedure for administrative review of tax audits. Pet. App. at 7.

Instead, Hyatt also sued FTB in Nevada court seeking declaratory relief, compensatory damages, and punitive damages for several alleged intentional torts. *Id.* at 7–8, 11.

FTB received less favorable treatment in the courts of Nevada than it would have received in its own courts. Although FTB would be completely immune from suit for an audit in California court, Cal. Gov't Code § 860.2, the Nevada courts denied complete immunity to FTB. Pet. App. 10. Instead, the Supreme Court of Nevada held that California was entitled to "partial immunity equal to the immunity a Nevada government agency would receive" in a Nevada court. *Ibid.*

On a writ of certiorari, this Court agreed that the Full Faith and Credit Clause did not require Nevada to extend to FTB the full immunity that the agency would have received in a California court, *Franchise Tax Bd. of California v. Hyatt* ("*Hyatt I*"), 538 U.S. 488 (2003), although several Justices questioned whether the Court's recent decisions suggested that FTB should have sovereign immunity from suit in an out-of-State court, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42). The Court recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," but it struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in

tort claims . . . arising out of its tax collection agency's residency audit." *Hyatt I*, 538 U.S. at 498. The Court thus concluded that "[t]he Nevada Supreme Court [had] sensitively applied principles of comity." *Id.* at 499. At oral argument, some Justices suggested that *Hall* might no longer be viable and that sovereign immunity might be available, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42), but the Court declined to address the question because FTB did not ask it to do so at the time. *Hyatt I*, 538 U.S. at 497.

When the case returned to the Nevada courts, matters worsened for FTB. The California state agency did not even continue to receive the same treatment that a Nevada state agency would have received. A Nevada trial court conducted a four-month trial several years after this Court's decision. At the end of that trial, the Nevada trial court ruled for Hyatt on each of his intentional tort claims. Pet. App. [illegible]. And although Nevada law would have limited damages against Nevada and barred punitive damages, Nev. Rev. Stat. § 41.035, the Nevada trial court awarded almost half a billion dollars to Hyatt, including a $250 million punitive damages award and a compensatory damages award in excess of the statutory cap. Pet. App. 11.

When this case returned to the Supreme Court of Nevada, that court agreed with the trial court's refusal to extend to FTB the compensatory damages cap that would have applied to the State of Nevada's

agencies. Although it ruled for the California state agency on several of Hyatt's claims and struck the punitive damages award, the Nevada Supreme Court affirmed the imposition of damages exceeding the statutory cap because Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity." Pet. App. at 45. The court did not consider California's interest in the enforcement of its tax laws. *Id.* at 42–46.

This case highlights all of the harms that could befall a State under *Nevada v. Hall*. After more than a decade and a half of costly litigation, California is now liable for a judgment of over a million dollars for fraud and must endure another trial to decide damages on a claim of intentional infliction of emotional distress. Pet App. at 72. Moreover, the success of this litigation has encouraged similar suits, which may force FTB to alter its procedures for enforcing California's tax policies. Pet. at 32–33.

IV. ADDITIONAL CONSIDERATIONS MILITATE IN FAVOR OF OVERRULING *HALL*

A. *Hall* suggested that some of the problems of permitting unconsented suits against a State in the courts of another State could be avoided by limiting another State's exercise of jurisdiction to situations that "pose[] no substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979). But *Hall*'s hypothetical preservation of immunity fails,

for at least two reasons, to provide adequate protection to the States from the costs imposed by suits in the courts of other States.

First, no clear standard can establish which cases pose a "substantial threat" to cooperative federalism. See *Hall*, 440 U.S. at 429 (Blackmun, J. dissenting) ("[I]t is hard to see just how the Court could use a different analysis or reach a different result in a different case."); *id.* at 442–43 (Rehnquist, J., dissenting) ("I do not see how the Court's suggestion that limits on state-court jurisdiction may be found in principles of 'cooperative federalism' can be taken seriously."). As explained above, this Court has already examined the possibility of such a distinction under the Full Faith and Credit Clause *in this very case* but failed to find a "principled distinction" between cases that pose a substantial threat and those that do not. *Hyatt I*, 538 U.S. 488, 498 (2003). After all, *every* case brought in the court of another State undermines a State's sovereignty. See pp. 21–22, *supra*.

Second, even if this Court could devise a standard to distinguish between cases that pose a substantial threat to cooperative federalism and those that pose a lesser threat, that standard is unlikely to be enforced rigorously, if at all. A state court in another State has an undeniable incentive to be less than diligent in applying such a standard in any case involving relief for that other State or its citizens, as most of these out-of-State suits do. And

this Court would be the only neutral arbiter to review such assumptions of jurisdiction—a relatively distant and illusory threat for a local trial court.

B. The rule in *Nevada v. Hall* also is not necessary to ensure that injured parties can seek relief. Sovereign immunity "bars suits only in the absence of consent." *Alden v. Maine*, 527 U.S. 706, 755 (1999). Although this Court has held that States are immune from suit in their own courts, *id.*, at 741–43, many States have already chosen to waive their immunity in their own courts in some circumstances. *E.g.*, Alaska Stat. §§ 09.50.250 et seq.; Fla. Stat. Ann. § 768.28; Ky. Rev. Stat. §§ 44.070 et seq.; Neb. Rev. St. §§81-8,209 et seq.; S.C. Code Ann. §§ 15-78-10 et seq.; W. Va. Code §§ 14-2-1 et seq. This waiver permits injured individuals to receive compensation without injuring the sovereignty of the States.

States could even choose to consent to suits in the courts of other States and might agree to submit to suits in each other's courts. Importantly, any decision to consent to suit in any court would be made by the States as sovereigns instead of by judicial fiat.

* * *

This Court should overturn *Nevada v. Hall* and return to the States the immunity from suit in the courts of other States that is implicit in the Constitution and consistent with the pre-ratification

history. Because this immunity from suit is important to the sovereign interests of the States, forty-five States have joined this brief in support of overruling *Hall* and a total of forty-five States have joined briefs that argue that *Hall* should be overruled. See p. 1 n.1, *supra*.

CONCLUSION

The decision of the Supreme Court of Nevada should be reversed.

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IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

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QUESTIONS PRESENTED

1. Whether States have immunity as of right – rather than immunity as a matter of comity – in the courts of other States.

2. Whether petitioner has shown a "special justification" for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

3. Whether the Full Faith and Credit Clause requires Nevada state courts to apply California's laws of sovereign immunity to a matter over which Nevada has legislative jurisdiction.

4. Whether the voluntary doctrine of comity requires Nevada state courts to apply California's laws of sovereign immunity when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

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INTRODUCTION

Now that this case has returned to the Court, the Board's principal argument turns out to be one that it did not even bother to make on the first go-round: that States have complete immunity as a matter of right in other States' courts. But the history of immunity among independent sovereigns – as the States once were and largely are today – flatly contradicts that theory. The relevant history shows unmistakably that, at the time of the Founding, sovereigns were not entitled to immunity as of right in other sovereigns' courts, but received immunity only as a matter of comity (i.e., with the consent of the home sovereign). *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Nothing in the Constitution or plan of the Convention altered that preexisting balance between different sovereigns. Furthermore, the Court has already rejected the Board's immunity-as-of-right argument in *Nevada v. Hall*, 440 U.S. 410 (1979), relying on the careful analysis of competing sovereign interests set forth in *Schooner Exchange*, and the Board offers no "special justification" for suddenly dispensing with that established precedent. Thus, whether the Court now reexamines the States' immunity as an original matter or simply adheres to *Hall* under traditional principles of stare decisis, the result is the same: States do not have immunity as of right in other States' courts. The States are free to obtain that immunity through mutual agreement, but they have no right to insist upon immunity over the objection of the forum sovereign.

The Board's alternative argument, a convoluted attempt to exploit a Nevada law capping damages for Nevada officials, is similarly unavailing. Although

the Board has modified its previous position that Nevada courts must apply California law granting total immunity to the Board – limiting it now to awards above the amount of the Nevada cap – its new argument, like the old one, runs head-on into the controlling Full Faith and Credit Clause standard, which permits a State to apply its own law whenever it is "competent to legislate" about the subject matter of the suit. *See Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) ("*Hyatt I*") (internal quotations omitted). The Court has already found that Nevada satisfies that standard in this case, *see id.*, and it is undisputed that Nevada law does not limit damages for out-of-state officials. Furthermore, the Board offers no authority for the illogical proposition that federal courts can *order* States to give "equal treatment" to other States as a matter of comity. It has been understood for centuries that granting comity is a voluntary act on a sovereign's part, and that doctrine thus provides no basis for the Board to forcibly elevate its own sovereignty over that of Nevada. The judgment below should be affirmed.

STATEMENT

1. The issues in this case arise out of a state-law tort suit, one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute stemmed from a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from

certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." JA259, 265. According to testimony from a former Board employee, the auditor freely discussed personal information about respondent – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about respondent. JA261, 263-65.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. JA267. After she had closed the audit, she boasted about having "convicted" respondent and returned to his Nevada home to take trophy-like pictures. JA253-55. The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. JA261, 267-68.

Within her department, Ms. Cox pressed for harsh action against respondent, including rarely issued fraud penalties. JA263. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *E.g.*, JA208-09, 213-23. And she often spoke coarsely and disparagingly about respondent and his associates. JA259-61, 265-67.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed

to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *E.g.*, JA224-45, 263. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. JA238-41, 243-45. The Board also disclosed its investigation to respondent's patent licensees in Japan. JA247-51.

The Board knew that respondent, like many inventors, had significant concerns about privacy and security. JA242. Rather than respecting those concerns, however, the Board sought to use them to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." JA277-78. Both Cowan and respondent himself understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. JA272, 274-75.

2. Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although this Court had held that a sovereign has no inherent sovereign immunity in the courts of a co-equal sovereign, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly gave the Board full immunity against respondent's state-law claims.

The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. JA167-68. Nevertheless, the court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," JA168, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused," JA169. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." JA168.

The Nevada Supreme Court declined, however, to apply California's immunity law to respondent's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." JA167. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." JA169. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." JA166 & n.10, 169, citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." JA169.

This Court, in a unanimous opinion, affirmed. *See Hyatt I.* Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 538 U.S. at 494 (internal quotations omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.*

The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

3. At trial, the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy. It awarded respondent a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court, for the most part, reversed. In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to one claim). And it held that, as a matter of comity,

the Board was immune from any award of punitive damages.

Reviewing the merits, the Nevada Supreme Court determined that respondent had not established necessary elements for various torts under Nevada law. *See* Pet. App. 25-38. The court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." *Id.* at 40. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* The court thus determined "that substantial evidence supports each of the fraud elements." *Id.* at 41.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." Pet. App. 45-46. The court pointed out that officials from other States are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" *Id.* at 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala.

1992). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.*, quoting *Faulkner*, 627 So. 2d at 366. Considering this lack of authority over other States' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." *Id.*

With respect to respondent's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that respondent had "suffered extreme treatment" at the hands of the Board (*id.* at 50) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to establish the proper level of damages. *Id.* at 51-62. It remanded the case to the trial court for that purpose.

Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 65. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

SUMMARY OF ARGUMENT

I. The States do not have immunity as of right in the courts of other States. This Court so held in *Nevada v. Hall*, 440 U.S. 410 (1979), and the relevant historical evidence shows that its decision was correct.

A. This Court has given great weight to "history and experience, and the established order of things, . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (internal quotations omitted). Here, an examination of that "history and experience" reveals three critical facts: *first*, that, prior to formation of the Union, the States had the status of independent nations and thus had the same sovereign immunity in each others' courts as other nations had in the courts of foreign nations; *second*, that the immunity enjoyed by one nation in the courts of another nation was *not* an immunity as of right, but an immunity that depended on the express or implied consent of the home sovereign; and, *third*, that, insofar as sovereign immunity among the States was concerned, the Formation did not change either the scope or the nature of that preexisting immunity.

The idea that immunity between sovereigns depends on the consent of the home sovereign is anything but novel. To the contrary, it has been understood for centuries that immunity among different sovereigns is grounded in, and derived from, fundamental principles of sovereignty itself. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). As Chief Justice Marshall explained in *Schooner Exchange*, "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Id.*

at 136. It would be directly contrary to that understanding for a foreign sovereign to unilaterally grant itself immunity from the jurisdiction of the home sovereign and its tribunals. It follows, therefore, that "[a]ll exceptions . . . to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself." *Id.* And that consent, having been given, can be withdrawn, at least with suitable notice, at any point in the future. *See id.* at 146.

The Board repeatedly disregards this critical principle, failing even to mention *Schooner Exchange*. To make its argument, the Board first assumes that sovereigns had universal immunity as of right in pre-Formation times and then asserts that formation of the Union left that immunity unchanged. But that gets matters backwards. Because the States did not have immunity as of right during their time as independent sovereigns, the proper question is whether formation of the Union *granted* them such immunity, thereby diminishing the States' preexisting "exclusive and absolute" jurisdiction over their own territory.

The clear answer is that it did not. To begin with, it is well-recognized that formation of the Union did not strip the States of their sovereign status. Although the States necessarily ceded some of their powers to the federal government, they nevertheless "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That residual sovereignty, in turn, left the States with broad powers to govern with respect to persons and events within their territory. Given how jealously the States guarded their sovereign powers, it is highly unlikely that the States would

have surrendered part of those powers – without saying a word about it – in favor of allowing other States to operate with impunity within their borders.

The Board does not, in fact, claim that the States engaged in any such surrender. Rather, having committed to its States-always-had-immunity-as-of-right theory, the Board tries to shore up that position by relying on general statements by various founding fathers and on dicta in 19th Century cases, all of which broadly declare that sovereigns are not amenable to suit even in courts of other sovereigns. But none of the Board's quoted material directly addresses the critical issue: whether immunity between sovereigns existed as of right or was dependent on consent of the home sovereign. Moreover, if the various statements are taken to mean that sovereigns have (and always have had) immunity as of right wherever they go, then those statements would be in direct conflict with the principles of sovereignty recognized in *Schooner Exchange*, one of this Court's seminal decisions. Despite its newfound willingness to urge overruling of cases, even the Board does not suggest that *Schooner Exchange* should be cast aside.

The Framers' remarks about sovereign immunity were also directed to a very different issue: whether the States would have immunity in the new federal courts. The States, of course, had good reason to be concerned about lack of such immunity. Not only did the language of Article III suggest that the States would be subject to suit, but, because the federal government was to be established as a *superior* sovereign, the States could not count on the mutuality of self-interest that was (and is) the bedrock of comity-based immunity among equal sovereigns. In setting up this new government, therefore, the States

wanted the same immunity that they enjoyed in their own courts – i.e., immunity as of right – and that is the subject the Framers were addressing. There is no comparable indication that the States were willing, or indeed felt any need, to trade part of their sovereignty for the same immunity in the courts of other States. That immunity remained a matter of comity on the part of the home State.

B. The historical evidence, properly understood, demonstrates that the States did not, and do not, have immunity as of right in each others' courts. But, even if the evidence were less certain, the Court should reach the same conclusion as a matter of stare decisis. The decision in *Hall* rejected the very same argument the Board makes here, and the Board has offered no "special justification" for overruling it. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotations omitted).

The Board's attack on *Hall* – in addition to being wrong – is noticeably thin. First of all, it is remarkable that the Board makes no effort to confront the core principles set forth in *Schooner Exchange*, even though *Schooner Exchange* was the principal authority on which *Hall* rested. Furthermore, to the extent the Board questions the reasoning of *Hall*, it mostly walks in the tracks of Justice Rehnquist's dissent in that case, relying heavily on the same Framers' statements and case citations that Justice Rehnquist discussed. And, while the Board purports to find an inconsistency between *Hall* and this Court's post-*Hall* decisions, the notion that those cases undermined *Hall* founders on the fact that none of the decisions even discussed, let alone disavowed, the principles of *Schooner Exchange*. That is hardly surprising given that none of the cases required the

Court to assess the competing interests of two equal sovereigns.

The Board also offers little evidence that *Hall* has caused grave problems for the States. Although lawsuits against States in state courts arise occasionally, they remain infrequent and are often dismissed on the basis of comity between States. Indeed, as a telling sign that such cases are of minimal concern, the Board did not even bother to challenge *Hall* on its previous trip to this Court. There is little reason to think, therefore, that overruling *Hall* is critical, or even particularly important, to effective operation of state governments.

The need to overrule *Hall* is also diminished by the fact that the States have other, more effective ways to gain sovereign immunity in each others' courts. Unlike the typical "constitutional" decision, *Hall* leaves the States free to obtain expanded immunity through normal political channels. In particular, the States can enter into agreements to provide immunity on a reciprocal basis, as various *amicus* briefs indicate that States are willing to do. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981). And the process of full discussion among the States would allow all branches of state governments to participate in the politically sensitive decision to surrender part of the States' sovereignty (and their citizens' right to secure relief) in exchange for guarantees of greater immunity in other States' courts.

Voluntary agreements among the States would also give the States an opportunity to define the scope of immunity they want to obtain and provide. Indeed,

one of the distinct oddities of the Board's position is that the immunity it seeks – total immunity for any and all actions, no matter what kind or how destructive – bears almost no resemblance to modern sovereign immunity. Thus, for example, the United States, which once granted other nations almost complete immunity for their actions in this country, now provides broad exceptions to that immunity for, among other things, commercial activities and certain torts. Agreements among the States would allow them to consider similar exceptions for state-to-state immunity, rather than accepting the across-the-board immunity that would result from overruling *Hall*. Thus, whether reaffirmed on its own terms or simply given respect as a matter of stare decisis, the decision in *Hall* should stand.

II. The Board's less sweeping submission – that Nevada should be ordered to apply its state-law damages cap to California officials – fails as well. Although the Board makes a roundabout argument that, under the Full Faith and Credit Clause, the Nevada courts had to apply *California's* law of total immunity to damages greater than *Nevada's* cap, this argument, apart from being a strange mishmash of California and Nevada law, is foreclosed by the governing Full Faith and Credit Clause standard. That standard provides, in simple terms, that a State may apply its own law to matters about which it is "competent to legislate." *Hyatt I*, 538 U.S. at 494 (internal quotations omitted). The Court has already found that the Nevada courts can apply Nevada law in this case, and it is undisputed that Nevada law does not provide a damages cap for out-of-state officials.

The Board tries to get around that problem by insisting that Nevada cannot exhibit "hostility" to California law. But that argument suffers from its own flaws. To begin with, it cannot be "hostile" as a constitutional matter for Nevada to do exactly what the Constitution permits it to do: apply its own law where it has legislative jurisdiction. Furthermore, the Board's attempt to add a "no hostility" test to the current Full Faith and Credit Clause standard would be a practical disaster, embroiling the Court in repeated, largely standardless inquiries into whether an otherwise constitutional choice-of-law decision crossed some unidentifiable "hostility" threshold. Finally, and in any event, it is pure hyperbole to say that the Nevada courts were hostile to California law (or even to California itself), when the Nevada Supreme Court granted the Board complete immunity for its negligent actions, prohibited any award of punitive damages against the Board, reversed the damages award on one tort claim because it rested on matters properly left to California's tax proceeding, and even carefully explained why it had decided not to limit compensatory damages for injuries caused by the Board's abusive actions. Far from showing hostility, the Nevada court took full and respectful account of the Board's sovereign status at every step.

The Board's attempt to create a federal doctrine of "mandatory state-to-state comity" is even less convincing. As has been true for centuries, comity is a *voluntary* doctrine, and the decision by one sovereign to grant comity to another sovereign ultimately lies within its discretion. It is thus entirely unsurprising that the Board cites no case – not one – saying that federal courts can tell state courts how to apply the doctrine of comity. Recognition of such a

power in the federal courts would, in fact, be a wholly inexplicable transfer of power from the States to the federal government.

Finally, the Board tries to fashion an equal-treatment argument out of principles of "equal sovereignty," suggesting that, by not applying the Nevada damages cap to California officials, Nevada somehow denied California its right to constitutionally based equality. In doing so, however, the Board has wrenched the "equal sovereignty" principle from its proper moorings. In its true form, the doctrine of equal sovereignty operates to assure that each State has the same powers within *its* territory as other States have within *their* territory. The doctrine does not mean – and could not mean without lapsing into incoherency – that every State has the same powers in *other* States as the home State does. The Board's continuing attempt to import its own sovereignty into Nevada thus falls of its own weight.

ARGUMENT

I. States Do Not Have Sovereign Immunity as of Right in the Courts of Other States.

A. The Historical Evidence Shows That Immunity Between Sovereigns Depends Upon Consent of the Home Sovereign.

This Court has traditionally looked to "'history and experience, and the established order of things,' . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999), quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890). To undertake that inquiry properly, however, it is essential to identify the precise form of sovereign immunity at issue. As we discuss, the history underlying a sovereign's immunity in its own courts is different from, and grounded in less complex consider-

ations than, the history of a sovereign's immunity in the courts of another independent sovereign. It is the latter immunity, not the former, that is at issue here.

The history of immunity among independent sovereigns makes quite clear that States do not have immunity as of right in the courts of other States. That conclusion follows from three basic points: *first*, that, prior to formation of the Union, the States were independent sovereign nations and had the same immunity in each others' courts as other sovereign nations had in the courts of foreign nations; *second*, that, before the Formation (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation; and, *third*, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign States, giving priority to the rights of visiting States at the expense of host States. As a result, the Board does not have sovereign immunity as of right in Nevada's courts.

1. Prior to Formation of the Union, the States Were Independent Sovereign Nations.

This Court has frequently recognized that, following the Declaration of Independence, the States had the status of independent sovereign nations. In *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808), for example, the Court observed that "the several states which composed this union, so far at least as regarded their municipal regulations *became entitled*, from the time when they declared themselves independent, *to all the rights and powers of sovereign states*." *Id.* at 212 (emphases added). Thus, "each of them was a sovereign and independent

state, that is, . . . each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796). Many years later, the Court again confirmed that the States "were then sovereign states, possessing, unless thus restrained [i.e., by the Articles of Confederation], all the rights and powers of independent nations over the territory within their respective limits." *Wharton v. Wise*, 153 U.S. 155, 166 (1894).

Both the Declaration of Independence and the Articles of Confederation set forth the States' sovereignty in plain terms. For its part, the Declaration of Independence stated "[t]hat these United Colonies are, and of Right ought to be Free and Independent States." Declaration of Independence para. 4 (1776). Article II of the Articles of Confederation then provided that "[e]ach state retains its sovereignty, freedom, and independence, . . . which is not by this confederation expressly delegated to the United States." Art. of Confederation, art. II (1781). And, while the Articles of Confederation did "delegate[]" a portion of the States' newly asserted sovereignty to "the United States," the Articles did not address, and did nothing to alter, the nature of the immunity that the States, as independent nations, had in each others' courts.

The Board does not question the historical status of the States as independent nations. *See* FTB Br. 30 (acknowledging such independence). Nor does it argue that, during their existence as independent nations, the States were entitled to *greater* sovereign immunity than other nations. The Board's immunity claim depends entirely on the proposition that, during the period after the Declaration of Independence and before formation of the Union, independent

nations had immunity as of right in the courts of other nations. As we discuss next, that proposition is simply incorrect.

2. Independent Sovereigns Enjoy Immunity in Other Sovereigns' Courts Only with the Consent of the Home Sovereign.

In the late 18th Century, independent nations did not have immunity as of right in the courts of other sovereigns. To the contrary, they enjoyed immunity only with the consent of the host nation.

This Court set forth that fundamental principle in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, two citizens of the United States filed an action against the Schooner Exchange – a French ship of war – claiming they were the rightful owners of the ship and demanding its return. At the time of the action, the warship was docked in the port of Philadelphia, having encountered severe weather and needing repairs. *See id.* at 118 (Statement). The plaintiffs' suit thus directly raised the question whether France, in order to protect its ship from seizure, was entitled to claim sovereign immunity in the courts of the United States.

Recognizing that the case raised a potential conflict between two sovereigns, Chief Justice Marshall carefully examined the authority of the United States as the host sovereign and of France as the visiting sovereign. Relying on "general principles" and "a train of reasoning," *id.* at 136, the Chief Justice explained how the competing sovereign interests were to be reconciled. Importantly for present purposes, he first set forth the guiding principle that "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible

of no limitation not imposed by itself." *Id.* Given that background understanding, it followed that a foreign nation could not unilaterally claim immunity from the home nation's jurisdiction, because that restriction, "deriving validity from an external source, would imply a diminution of [the home nation's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power [i.e., the foreign nation] which could impose such restriction." *Id.* In the Court's view, that proposition was incompatible with the inherent nature of sovereignty itself.

The Court then announced a second critical principle, one that proceeded from the first: that any immunity enjoyed by a foreign nation must stem from the consent of the home nation. As the Court stated, "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* That consent could be either express or implied, and was presumed to be freely given, *id.*, but it remained the prerogative of the home sovereign to withdraw that consent – with suitable notice (*see id.* at 137) – if its own sovereign interests so dictated. *See id.* at 146.

The principles set forth in *Schooner Exchange* have long been the foundation of sovereign immunity among nations. Just a decade after that decision, this Court, speaking through Justice Story, emphasized its rejection of the "notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822).

The Court reiterated that the immunity of a foreign sovereign, and of his property, within the territory of an independent sovereign "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." *Id.* at 353. And it made clear that, "as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels." *Id.*

In the ensuing centuries, this Court has repeatedly reaffirmed the basic principle that immunity in another sovereign's courts depends upon the latter's consent. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the Court stated plainly that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* at 486. Subsequently, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court, after noting that *Schooner Exchange* "is generally viewed as the source of our foreign sovereign immunity jurisprudence," *id.* at 688, confirmed that "the jurisdiction of the United States over persons and property within its territory 'is susceptible of no limitation not imposed by itself,' and thus foreign sovereigns have no right to immunity in our courts," *id.*, quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Insofar as foreign sovereigns enjoy immunity in United States courts, therefore, they do so "as a matter of comity," *id.*, not

absolute entitlement. *See also Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014).

Far from seeking to discredit or explain away the principles of *Schooner Exchange*, the Board does not even refer to that decision. For supporting case law, it relies instead on a pre-Formation Pennsylvania Court of Common Pleas decision declining to hear a suit against the Commonwealth of Virginia. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781). But *Nathan* is entirely consistent with *Schooner Exchange*'s view that immunity among independent sovereigns is a matter of comity. There, Pennsylvania's Attorney General, acting at the direction of the Supreme Executive Council of Pennsylvania, urged the state court to accord immunity to Virginia, much as attorneys for the United States urged this Court to accord immunity to France in *Schooner Exchange*. *See* 11 U.S. (7 Cranch) at 120-26, 132-35 (Statement). That intercession not only preserved Virginia's dignity by removing the need for it to make an appearance but, importantly, expressly signified Pennsylvania's consent to Virginia's claim of immunity.

3. Formation of the Union Did Not Change the Nature of the States' Immunity in Each Others' Courts.

The historical evidence thus demonstrates that, prior to formation of the Union, the States did not have immunity as of right in the courts of other States. Like other independent nations, they were entitled to immunity only with the express or implied consent of the host sovereign. The remaining question, then, is whether the Formation altered that allocation of authority among sovereigns, stripping the host sovereign of its power to withhold consent if it deemed immunity to be incompatible with its own

sovereign interests. The short answer is that it did not.

The Board, in fact, does not even advance such an argument. Putting all its eggs in the States-already-had-immunity-as-of-right basket, the Board makes no attempt to show that, even if that hypothesis is wrong, the formation of the Union subsequently eliminated the need for the home sovereign's consent. That reticence is for good reason: there is no historical evidence to show that any such reduction in state sovereignty took place.

a. To begin with, formation of the United States did not extinguish the States' sovereign powers within their own borders. On the contrary, the States "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Although the States necessarily subordinated some of their authority to the new federal government, they nonetheless retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997), quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). *See also Alden*, 527 U.S. at 713-14. As this Court has noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at 713, quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status," *id.* at 714.

The Tenth Amendment reflects that understanding, expressly declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people." U.S. Const. amend. X. The States' "reserved" powers thus are directly traceable to the powers that the States had originally possessed as independent sovereign nations. "'These powers . . . remain, after the adoption of the constitution, *what they were before*, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001), quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (emphasis added).

The States' residual sovereignty was not merely ceremonial: it left each State with broad authority over persons and events within its borders. As this Court long ago observed, "the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotations omitted). Thus, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. That sovereignty necessarily encompasses "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," *Duro v. Reina*, 495 U.S. 676, 685 (1990); *see Munaf v. Geren*, 553 U.S. 674, 694-95 (2008).

The right of a sovereign to govern within its own territory, in turn, has important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860). Conversely, it has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty

from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). In light of these fundamental principles, it would be highly unusual for States to invert the traditional rules of sovereignty – surrendering authority over their own territory by allowing other States to disregard local laws – and courts should infer that kind of submissive intent only upon the most unambiguous evidence. As the Court recently observed, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013).

b. That clear indication is lacking here. The Board does not cite a single word showing that, at the time of the Formation, either the Framers or representatives of the States specifically addressed the States' immunity in one another's courts and declared that, contrary to the prevailing rule before the Formation, such immunity would henceforth exist as of right and not as a matter of comity.

The most the Board offers is a collection of broad, highly generalized statements to the effect that sovereigns are not amenable to suit by individuals in any court (with an occasional reference to other States' courts). *See* FTB Br. 31-36. But, despite the stature of speakers like Hamilton and Madison, there are serious problems with relying on such authority in this context. First of all, if those declarations are taken to establish that, in the late 18th Century, sovereigns enjoyed immunity as of right wherever they went, regardless of the home sovereign's consent, that view would mean that *Schooner Exchange*, one of this Court's historic decisions, was in error. Even the Board does not make *that*

argument.[1] Moreover, unlike Chief Justice Marshall's detailed reasoning in *Schooner Exchange*, none of the statements cited by the Board (including Marshall's own, *see* FTB Br. 34) actually discussed whether immunity in another sovereign's courts depended on the consent of the host sovereign. To the extent the Board's cited material fails to undertake the critical "dual sovereign" analysis of *Schooner Exchange*, therefore, the latter is more precise and more persuasive.

Furthermore, and relatedly, the Board does not distinguish between the historical *fact* of sovereign-to-sovereign immunity and the *basis* for that immunity. It is certainly correct that, at the time of the Formation, sovereign nations were expected to, and did, extend immunity to each other as a matter of custom. Thus, Hamilton could properly ground his view of universal sovereign immunity in "the general sense and the general practice of mankind." The Federalist No. 81, at 487. But neither a "general sense" nor a "general practice" of consent-based immunity covertly transforms a host sovereign's voluntary act into an indefeasible right, exercisable without regard to the home sovereign's consent. Custom notwithstanding, a sovereign retains the sovereign power to decide, based upon its own sovereign interests, not to grant further immunity in the future. *See Santissima Trinidad*, 20 U.S. (7 Wheat.) at 353.

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[1] The same problem arises with occasional dicta in decisions of this Court stating that a sovereign can never be sued in the courts of another sovereign. *See* FTB Br. 37-38 (citing cases). If those statements are read to say that sovereigns enjoy immunity as of right in other sovereigns' courts, they are directly at odds with the reasoning of *Schooner Exchange*.

In addition, the contemporary statements cited by the Board were addressed to a very different issue: whether the States would have immunity in the *federal* courts. The language of Article III suggested they might not, and the heavily indebted States, not surprisingly, wanted assurance they would. That question, however, had an unusual twist: although the new United States would be an independent sovereign – and thus traditionally would need to give its consent to any immunity sought by the States – it was a sovereign the States themselves were directly involved in forming. Consequently, the States were in unique position to decide at the time of creation whether they would have the same immunity in the federal courts that they enjoyed in their own courts. That is the question that Hamilton, Madison, and others were actually debating, not the States' immunity in each others' courts.

The Board seems to believe that, because the States sought immunity as of right in the federal courts, they would have demanded it in the courts of other States as well. But the two situations are not the same. The comity-based custom of immunity among independent nations was grounded in, and traditionally depended on, the equal stature of the various sovereigns. Although comity is ultimately a matter of grace and discretion, *see* pages 50-52, *infra*, it has proved effective over the centuries because it is backed by each sovereign's powerful regard for mutuality and "reciprocal self-interest." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955). In practical terms, each sovereign has a strong incentive to grant immunity to other similarly situated sovereigns in order to secure a corresponding grant of immunity when the roles are reversed. That do-unto-others principle governed the relations

among the States both as independent nations and, subsequently, as equal sovereigns within the newly formed United States.

That same state of equilibrium did not exist, however, between the States and the new federal government. Quite the opposite, in fact. Under traditional principles of sovereign immunity, the federal government (a superior sovereign) would be entitled to immunity as of right in the courts of the States (inferior sovereigns). Given that hierarchy, the United States had no reason to be concerned that, if it denied immunity to the States, they would respond by denying immunity in return, and the States could not readily assume that federal courts would follow the practice among equal sovereigns of granting immunity as a matter of comity. The States thus sought the same immunity – immunity as of right – that they had in their own courts.[2]

The Board tries to turn the Framers' silence regarding state-to-state immunity into a positive, suggesting that the right to immunity among sovereigns was "'too obvious to deserve mention.'" FTB Br. 40, quoting *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). That argument just ducks the pivotal question: whether nation-to-nation – and hence state-to-state – immunity was a matter of comity or of absolute privilege. Because it was the accepted custom that sovereigns would voluntarily extend immunity to one another under the doctrine of

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[2] Insofar as the *federal* government was concerned, moreover, a State did not have "exclusive and absolute" jurisdiction over its territory. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Thus, the usual rules of consent-based immunity – which depended on principles of territorial autonomy – would not naturally apply.

comity, it was undoubtedly the assumption, especially after the decision in *Nathan*, that the States would do so as well. It is one thing, however, for the States to expect immunity as a matter of comity, quite another for them to replace that voluntary practice with binding law. *See, e.g., Altmann*, 541 U.S. at 694-95 (distinguishing "a justifiable expectation [of immunity] as a matter of comity" from a "'right' to such immunity").

To be sure, every sovereign *prefers* to have immunity in other sovereigns' courts, provided that the immunity comes without cost. But immunity between sovereigns is a two-way street. As the Court made clear in *Schooner Exchange*, the act of granting immunity to another sovereign inevitably means that the home sovereign is yielding control over persons and events within its territory. *See* 11 U.S. (7 Cranch) at 136 (discussing "diminution of [home nation's] sovereignty"). Thus, to gain immunity in other States, each State must give up sovereignty in return. That trade-off may or may not be one worth making, but the Board offers no historical evidence to demonstrate the States affirmatively chose to make it.

It has been argued (though not by the Board or its *amici*) that the grant of Judicial Power in Article III – extending jurisdiction over "Cases . . . between a State and Citizens of another State" – extinguished the States' preexisting power to deny immunity to other States. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249 (2006). According to this theory, formation of the Union "meant that future development of interstate immunity law would occur in the Supreme Court and was no longer left primarily to state decision makers." *Id.*

at 262. But this explanation is based on just the kind of inference by "inscrutable silence" that the Court has warned against. *See Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133. Article III does not explicitly oust the state courts of jurisdiction over citizen-State cases, and implicit displacement of state jurisdiction would necessarily follow only if this Court's jurisdiction were *exclusive*. By its plain terms, however, Article III does not provide for exclusive jurisdiction in citizen-State cases.

The theory is also incomplete. The central question is not whether this Court could apply federal "interstate immunity law" requiring States to give each other immunity, but whether there *is* such federal law. The answer is no. Whether examined at the time of the Formation or in the years since, federal law has had nothing to say about the States' immunity in each others' courts. In particular, while the Eleventh Amendment confirmed that the States had immunity as of right in the federal courts, and left untouched the States' preexisting immunity in their own courts, *see Alden*, 527 U.S. at 712-30, it did not address, much less purport to overturn, the historical principle that immunity among equal sovereigns depends on consent of the home sovereign.

In short, the Board cannot show what it needs to show: that the States have immunity as of right in the courts of other States. At most, it has shown that, like sovereign nations in general, States have granted immunity to each other as a matter of custom. *See id.* at 749 (noting that "the immunity of one sovereign in the courts of another has often depended in part on comity or agreement"). That is not enough. Furthermore, assuming that a sovereign must give prior notice before departing from that custom – as

Schooner Exchange suggested, *see* 11 U.S. (7 Cranch) at 137 – the Board cannot show lack of notice either. Well before the events in this case, the Nevada Supreme Court made clear that other States could not expect to receive absolute sovereign immunity in Nevada's courts as a matter of comity. *See Mianecki v. Second Judicial Dist. Court*, 658 P.2d 422 (Nev. 1983).[3] Thus, the Board's attempt to claim immunity as of right in Nevada's courts falls short on all fronts.

B. This Court Should Adhere to the Holding of *Nevada v. Hall* as a Matter of Stare Decisis.

Even if the historical evidence were less compelling, principles of stare decisis should lead to the same conclusion: States do not have immunity as of right in the courts of other States. The Court said so in *Hall*, and the Board provides no good reason for overruling that decision now.

1. Respect for Precedent Is Central to the Rule of Law.

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality). Indeed, just last Term, this Court reemphasized that "[o]verruling precedent is never a small matter. *Stare decisis* . . . is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409

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[3] That view of immunity can hardly have surprised California agencies, given that the California Supreme Court had previously held that other States enjoyed no immunity as of right in the California courts. *See Hall v. University of Nevada*, 503 P.2d 1363 (Cal. 1972).

(2015), quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

The principles of stare decisis are important as both an institutional and a practical matter. As the Court has noted, stare decisis "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id.*, quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *See also Hilton*, 502 U.S. at 202 ("Adherence to precedent promotes stability, predictability, and respect for judicial authority."). In particular, the doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Stare decisis also allows the Court to develop a body of settled law without the need for perpetual reexamination. As Justice (then-Judge) Cardozo once noted, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921). Stare decisis provides an essential buffer against that prospect, "reduc[ing] incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 135 S. Ct. at 2409.

The Court thus has set a demanding standard for overruling its prior decisions. "[A]n argument that

we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Id.* Rather, "[t]o reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.' *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)." *Id.* (parallel citation omitted). *See also Hilton*, 502 U.S. at 202. The Board has not come close to showing a "special justification" here.

2. The Board Has Failed To Show a "Special Justification" for Overruling *Nevada v. Hall*.

The Board's attack on *Hall* – and its corresponding plea to set aside stare decisis – suffers from numerous problems. We have already discussed the fact that the Board's analysis depends upon a false premise, i.e., that States had immunity as of right in courts of other States prior to formation of the Union. *See* pages 16-31, *supra*. The Court in *Hall* correctly recognized the fact that, as independent nations, States enjoyed immunity only as a matter of comity, basing its decision on Chief Justice Marshall's thoughtful analysis in *Schooner Exchange*. *See* 440 U.S. at 416-17. As a result, *Hall* was not "wrongly decided" at all.

The Board also fails to deal with *Hall* squarely. Given the importance of stare decisis to development of the law, it seems remarkable that a litigant would urge the overruling of a prior decision as "[p]oorly [r]easoned," FTB Br. 26, without attempting to rebut the principal authority on which that decision rested. But the Board accomplishes that feat, indeed goes it one better, by not even *mentioning* this Court's holding in *Schooner Exchange*. By neglecting to

address *Hall*'s reasoning on its own terms, the Board is hardly in good position to criticize the *Hall* opinion as "difficult to fathom." *Id.* at 29.[4]

In any case, the Board brings forth little that is new. Most of the Board's arguments – and the bulk of its historical material – were previously considered in *Hall*. Indeed, the Board's submission here bears a striking resemblance to Justice Rehnquist's dissent in *Hall*. Again and again, the Board puts emphasis on the same case citations and statements by the Framers – in particular, those of Hamilton, Madison, and Marshall – that Justice Rehnquist featured in his dissenting opinion. *Compare* FTB Br. 33-34 (Hamilton) and *Hall*, 440 U.S. at 436 (Rehnquist, J., dissenting) (same); FTB Br. 34 (Madison) and 440 U.S. at 436 n.3 (same); FTB Br. 34 (Marshall) and 440 U.S. at 436 n.3 (same); FTB Br. 30-31 (*Nathan v. Virginia*) and 440 U.S. at 435 (same); FTB Br. 37 (*Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) and 440 U.S. at 437 (same); FTB Br. 37 (*Cunningham v. Macon & B.R.R. Co.*, 109 U.S. 446, 451 (1883)) and 440 U.S. at 437-38 (same); FTB Br. 38 (*Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961)) and 440 U.S. at 438 (same); FTB Br. 37-38 (*Hans v. Louisiana*) and 440 U.S. at 439-40 (same). This Court already denied one petition for rehearing in *Hall*, *see* 441 U.S. 917 (1979), and, in its current filing, the Board is essentially asking the Court just to reshuffle the deck.

Apart from the repetitive historical material, the Board relies heavily on various sovereign immunity

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[4] Justice Blackmun, in his *Hall* dissent (joined by Chief Justice Burger and Justice Rehnquist), saw no such difficulty, calling the Court's work a "plausible opinion." 440 U.S. at 427 (Blackmun, J., dissenting).

decisions since *Hall*. *See* FTB Br. 42-50 (discussing cases). Contrary to the Board's apparent view, however, the lesson of those cases is not that States always have sovereign immunity everywhere but that the States' right to sovereign immunity derives from its historical origins. *See, e.g.*, *Alden*, 527 U.S. at 712-30; *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-61 (2002). Thus, in examining the States' immunity in each others' courts – a situation that "'necessarily implicates the power and authority of a second sovereign,'" *Alden*, 527 U.S. at 738, quoting *Hall*, 440 U.S. at 416 – it is critical to look at the specific history identifying, and properly explaining, how immunity among independent sovereigns was established. None of the post-*Hall* decisions explored that history, for the simple reason that the Court was addressing quite different questions about the States' immunity in federal tribunals and their own courts. Indeed, none of the decisions addressing the States' immunity so much as refers to *Schooner Exchange*, the landmark decision regarding one sovereign's immunity in an equal sovereign's courts.

The Board likewise fails to show that *Hall* has led to serious financial consequences for the States. Although Justice Blackmun feared that the Court's decision would "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system," 440 U.S. at 427 (Blackmun, J., dissenting), no such upheaval has taken place. Suits against States in state courts – rare before the decision in *Hall* – remain few and far between. Furthermore, in those infrequent instances when such suits have been filed, state courts have commonly relied on the doctrine of comity to extend broad protections to their sister States, as the Nevada

Supreme Court did here. *See, e.g.*, *Cox v. Roach*, 723 S.E.2d 340, 346 (N.C. Ct. App. 2012); *Greenwell v. Davis*, 180 S.W.3d 287, 297 (Tex. Ct. App. 2005).

There have been no dramatic political repercussions either. To state the obvious, the decision in *Hall* hardly provoked a *Chisholm*-like reaction.[5] *See Alden*, 527 U.S. at 720 (*Chisholm* "decision fell upon the country with a profound shock") (internal quotations omitted). Apart from filing a few *amicus* briefs saying that *Hall* should be overruled, the States have taken no active measures since *Hall* to obtain greater immunity in other States' courts. Indeed, the Board itself was so unconcerned about the *Hall* decision that it did not bother to challenge it on its first trip to this Court, *see Hyatt I*, 538 U.S. at 497, and then largely disclaimed opposition to it at oral argument, JA177-79. This steadfastly passive approach strongly suggests that immunity as of right in other States' courts is of little importance to effective operation of state governments.

The Board suggests that stare decisis should apply less vigorously because *Hall* was a "constitutional decision." FTB Br. 56. But that argument is conspicuously out of place in this context. The usual reason that constitutional decisions are subject to more liberal reexamination – that only this Court can undo the consequences of its prior decision (*see, e.g.*, *United States v. Scott*, 437 U.S. 82, 101 (1978)) – does not apply to a ruling that allows the political branches, both state and federal, to alter the decision at will. Here, that door is wide open. As we discuss next, nothing in *Hall* prevents the States from agreeing to provide immunity in each others' courts or from

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[5] *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

asking Congress to require such immunity. Although stare decisis is not an "inexorable command," *Payne*, 501 U.S. at 827-28, the States' own inertia is not a substantial reason for setting it aside.

3. States Can Achieve Their Objective of Reciprocal Immunity Through Voluntary Agreements and Other Political Means.

The Board rests much of its anti-stare decisis argument on dire speculation that, absent full immunity, state courts will subject their sister States to widespread, large-dollar judgments. The Board does not cite any real-life examples of such judgments – apart from the lower court decision here, which was almost totally reversed by the Nevada Supreme Court – so the Board is left to mount a generalized assault on the effectiveness of comity principles. *See* FTB Br. 55-56. Even on its own terms, that attack is open to considerable doubt: after all, civilized nations have relied on the doctrine of comity for hundreds of years. But, putting comity aside for the moment, it is clear that the States have other more expedient, and effective, ways to obtain the immunity they seek.

The most obvious solution to the States' claimed problem is for the States to enter into bilateral or multilateral agreements to provide immunity in each others' courts. For example, the only two state-to-state immunity cases reaching this Court have involved lawsuits in the neighboring States of California and Nevada, both of which now claim to support absolute immunity as of right in state courts. *See* West Virginia et al. Br. 2-32 (joined by Nevada). If that is what California and Nevada are truly seeking, it should be a relatively simple matter for the two States to achieve that end by mutual agreement.

The States need not, however, proceed two by two in order to gain greater immunity. The *amicus* briefs in this case indicate that as many as 45 States believe that States should have immunity as of right in each others' courts. *See id.*; South Carolina State Ports Authority Br. 2-21. That goal, however, lies entirely within their own reach. If the States are willing to exchange part of their sovereignty at home for broadened immunity in other States, they can enter into a single expansive agreement making mutually binding commitments to that effect. And, as a not insignificant side-benefit, that process of open give-and-take would allow all branches of state government (as well as affected citizens) to be involved in deciding whether States should part with a portion of their internal sovereignty in order to obtain greater immunity outside their borders.

Such voluntary agreements among the States are not only permitted but specifically contemplated. The Constitution, of course, expressly provides for compacts and agreements through which the States, with the approval of Congress, can advance their shared interests. *See* U.S. Const. art. I, § 10, cl. 3. But the States are also free to enter into agreements without congressional approval. As this Court has noted, "[w]here an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the [Compact] Clause and will not be invalidated for lack of congressional consent." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), quoting *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978).

Applying that standard, there is no reason that Congress would need to approve an agreement among the States granting themselves immunity in each others' courts. Agreements among States to provide reciprocal immunity would not "interfere with the just supremacy of the United States." *Id.* (internal quotations omitted). If anything, the effect would be the reverse. Rather than expanding the collective power of the States, the agreements would *reduce* each signatory State's sovereignty in return for expanded immunity. That is just the kind of state-to-state readjustment that can, and should, be left to the States themselves.

Equally important, discussions among the States would not be limited to addressing immunity on an all-or-nothing basis. In asking this Court to overrule *Hall*, the Board is seeking a ruling that would give every State total immunity as a matter of right, regardless of the nature of the defendant State's actions and regardless of the impact on the home State's sovereignty. That is an extraordinary proposal. By taking up the question themselves, however, the States could tailor the terms of voluntary agreements to extend as much or as little immunity as they deemed appropriate. For instance, the States could agree to grant immunity for all acts by other States – including commercial activities – or provide immunity just for certain kinds of governmental actions. Or the States could decide to allow specified suits against themselves but impose a ceiling on recoverable damages.

It is striking, in fact, that the Board is asking this Court to impose the kind of sweeping immunity that is all but obsolete among sovereigns in modern times. For example, the United States – which once extend-

ed almost complete immunity to foreign sovereigns – has substantially narrowed its grant of immunity to reflect current circumstances. In keeping with that revised approach, the Foreign Sovereign Immunities Act first sets forth a broad grant of immunity but then carves out significant exceptions for commercial activities and torts, as well as certain acts of terrorism. *See, e.g.*, 28 U.S.C. § 1605(a)(2) (commercial activities), (a)(5) (tortious acts and omissions); *id.* § 1605A(a)(1) (acts of terrorism).

The States, however, are asking this Court for much more: immunity that would allow them to enter another State and do as they please without being held to account under that State's laws. If that immunity had been in place years ago, it would have meant that the plaintiffs in *Hall* – who were severely injured by a Nevada official driving in California (440 U.S. at 411) – would have been left to bear their injuries without any redress at all, even though California law expressly entitled them to compensation. And, on a going-forward basis, state officials would apparently be free to target citizens in other States for physical assaults, to invade their privacy, or to destroy their property, without giving any regard to state laws providing relief for those destructive acts.

Given the potentially drastic consequences of total immunity, it seems far from certain that the States, if they entered into voluntary agreements, would actually abandon all their authority to accord relief to their citizens. Be that as it may, however, the process of negotiating voluntary agreements would at least allow the States to confront the question for themselves, rather than simply accept a one-size-fits-all solution handed down by this Court. That is a far better course than the overruling of a decision that

has led to little practical difficulty and that was, in fact, entirely correct.

4. Congress Can Legislate To Provide the States with Expanded Immunity.

The States have other means of gaining immunity as well. In particular, the second sentence of the Full Faith and Credit Clause contains an express grant of power to Congress to declare the "effect" of public acts in state courts. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). If the States elected to do so, therefore, they could seek federal legislation directing States to apply the immunity laws of their sister States, the ruling that the Board unsuccessfully sought, as a constitutional matter, in *Hyatt I*. As the national legislative body, Congress would be well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, unlike a constitutional holding that would freeze the rights of both forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

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In short, the States have shown no entitlement to immunity as of right in the courts of other States. The Board's claim is unsupported by history and blocked by the decision in *Hall*. The Court should again reject the Board's request to elevate its sovereignty over the sovereignty of its sister State.

II. Neither the Full Faith and Credit Clause nor Principles of Comity Require Nevada's Courts To Apply California Law, in Whole or in Part, to a Matter About Which Nevada Is Competent To Legislate.

The Board's alternative argument is that, by declining to apply Nevada's cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith and Credit Clause and principles of comity. According to the Board, the Nevada courts were obliged to apply the damages cap to California officials as a matter of "equal treatment." FTB Br. 17-25. But, however useful the idea of equal treatment may be as a "benchmark" for dealing with other sovereigns, *Hyatt I*, 538 U.S. at 499, there is no provision of federal law requiring it. Indeed, the Board is unable to identify *any* recognized legal basis for its theory, relying almost entirely on an over-reading of two passing remarks by this Court in *Hyatt I* and a thoroughly inapt invocation of the term "equal sovereignty." That sparse authority is nowhere near enough to justify the unprecedented ruling that the Board seeks.

A. The Full Faith and Credit Clause Allows Nevada To Apply Its Own Law to This Suit.

1. States May Apply Their Own Law to Matters About Which They Are Competent To Legislate.

This Court has made clear that the Full Faith and Credit Clause places only modest restrictions on the States' authority to apply their own laws to lawsuits in their courts. "Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed

by the judgment,' it is less demanding with respect to choice of laws." *Hyatt I*, 538 U.S. at 494, quoting *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (citation omitted; alterations in original). The Board's efforts to rewrite that principle were found wanting before, *see id.* at 495-99, and are no more impressive now.

The governing rule regarding choice of law under the Full Faith and Credit Clause is simple and straightforward: a State may apply its own laws to "'a subject matter concerning which it is competent to legislate.'" *Id.* at 494, quoting *Sun Oil*, 486 U.S. at 722; *Baker*, 522 U.S. at 232. Thus, to determine whether a state court applying its own law has acted within constitutional bounds, the Court need ask only whether the State had legislative jurisdiction over the subject matter of the lawsuit. The Court, of course, has already answered that question in this case. In *Hyatt I*, the Court specifically found that Nevada was "competent to legislate" with respect to the torts in question. *See* 538 U.S. at 494.

The Nevada courts were thus constitutionally entitled to apply Nevada law to this case. By its plain terms, Nevada law provides no immunity – total or partial – for a foreign sovereign, leaving such immunity to be decided on a case-by-case basis as a matter of comity. Nevada does impose a cap on damage awards against *Nevada* officials, *see* Nev. Rev. Stat. § 41.035(1), but that cap is a condition on Nevada's waiver of sovereign immunity in its own courts and clearly does not apply to officials of other States. Application of Nevada law thus provides no immunity to the Board.

Faced with this obstacle, the Board suggests that the Nevada damages cap is unconstitutional if it

applies to Nevada officials but not to officials of other States. *See* FTB Br. 44. But the Board offers no credible authority for that proposition. Its purported legal support consists of one Commerce Clause case, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), that, to say the least, has nothing to do with the scope of immunity among sovereigns. And, insofar as the Board is relying on the concept of "equal sovereignty," its argument runs directly counter to cases making clear that the States do not have "equal" sovereign powers in the territories of other States. *See* pages 52-54, *infra*.

2. The Board's Attempt To Add a "No Hostility" Requirement to the Constitutional Test Is Unsupported and Unwarranted.

The finding that Nevada has legislative jurisdiction should be the end of the constitutional inquiry under the Full Faith and Credit Clause. Although the Board advances a jerry-built argument based on a mixture of Nevada and California law – saying that Nevada had to apply *California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials – that argument falls at the first hurdle because it ignores the dispositive Full Faith and Credit Clause standard. Given that Nevada is "competent to legislate" with respect to the subject matter of this lawsuit, *Hyatt I*, 538 U.S. at 494, the Clause does not require its courts to apply California law at all, let alone a non-existent California law designed to mirror an inapplicable Nevada law.

The Board nonetheless argues that Nevada, in making its choice-of-law decision, cannot exhibit "hostility" to California law. FTB Br. 21-22. But this argument has its own defects. To start with, it

cannot be "hostile" for a State to do nothing more than apply its own law to a matter over which it has legislative jurisdiction: that is precisely what the Constitution allows it to do. As this Court has said, "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders").

The Board's two-step inquiry would also entangle the Court in endless, time-consuming inquiries regarding application of a State's own law. Instead of just conducting the uncomplicated inquiry now required by the Full Faith and Credit Clause – i.e., "does the forum State have legislative jurisdiction?" – the Court would need to undertake a second constitutional inquiry to decide whether a state court's otherwise permissible decision to apply its law should be regarded as "hostile" to the law of another State (something that aggrieved litigants will routinely claim). In every case, therefore, the Court would have to examine the law of two or more States and try to determine whether the home forum had overstepped some unidentified bounds of "hostility" in choosing its own law. That inquiry, by its very nature, would be largely standardless and, even more important, untethered to any recognized principles of full faith and credit.

To make matters worse, it is all but certain that the end result of applying an expansive, ill-defined "hostility" test would be a return to the long-abandoned days of "weighing" competing state interests. After all, the underlying premise of the Board's proposal is that this Court should promote California's interest in claiming immunity over Nevada's interest in compensating its injured residents. There is no principled way to measure those kinds of competing state interests, and the Court sensibly ended its efforts to do so. *See Pacific Employers*, 306 U.S. at 501 (limiting *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), to its facts). As the Court observed in this very case, "the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada." *Hyatt I*, 538 U.S. at 498.

To support its "no hostility" requirement, the Board relies on a single case, *Carroll v. Lanza*, 349 U.S. 408 (1955), cited (though not actually discussed) in *Hyatt I*. *Carroll* offers no help to the Board, however, because the Court in that case specifically found that "Arkansas, the State of the forum, [was] *not* adopting any policy of hostility to the public Acts of Missouri." *Id.* at 413 (emphasis added). Rather, as the Court observed, the State was simply "choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." *Id.* That, of course, is exactly what happened in this case: Nevada, the forum State, "cho[se] to apply its own rule of law to give affirmative relief for an action arising within its borders." The holding of *Carroll* makes clear, therefore, that a forum's basic choice of

its own law is not a hostile action in any constitutionally meaningful sense.[6]

In any event, it goes well beyond exaggeration to say that the Nevada courts exhibited hostility to California law or, for that matter, to California as a sovereign. *See* FTB Br. 23 (decision below "clearly failed to display a 'healthy regard for California's sovereign status'"), quoting *Hyatt I*, 538 U.S. at 499. Although the Nevada Supreme Court did not grant every conceivable wish that the Board had, it still went to great lengths to respect the dignity of its neighboring State. Far from treating the Board "just as any other litigant," *Hall*, 440 U.S. at 427 (Blackmun. J., dissenting), the court applied traditional principles of comity to shield the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court applied California law to give the Board absolute immunity for its negligent acts and to free it from any obligation to pay punitive damages – while also barring interference with the California tax proceedings – precisely because of its status as a co-equal sovereign. *See* JA168 (negligence); Pet. App. 65 (punitive damages); *id.* at 53-57 (non-interference).

Furthermore, in the one instance where the Nevada court departed from the "benchmark" of liability for

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[6] The Court in *Carroll* distinguished two earlier cases, neither of which involved the basic choice-of-law question, i.e., what substantive law should govern the rights of the respective parties. Rather, both decisions involved situations "where the State of the forum [sought] to exclude from its courts actions arising under a foreign statute." 349 U.S. at 413. As a result, the state courts were not simply applying their own "rule[s] of law" to the events at issue, but were closing their courthouses to foreign causes of action entirely. Nothing of the sort occurred here.

Nevada officials, it specifically explained why granting the immunity sought by the Board would undermine Nevada's interest in protecting its residents from deliberate attacks by other sovereigns. The court noted that, unlike officials from other States, Nevada officials "'are subject to legislative control, administrative oversight, and public accountability'" in Nevada. Pet. App. 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). *See, e.g.*, Nev. Rev. Stat. § 284.385(1)(a) (authorizing dismissal or demotion of employees for "the good of the public service"); Nev. Admin. Code § 284.650(1), (4) (authorizing discipline for "[a]ctivity which is incompatible with an employee's conditions of employment" and for "[d]iscourteous treatment of the public . . . while on duty"). As a result, it noted, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while there is no comparable safeguard against state officials that "'operate[] outside such controls in this State.'" Pet. App. 45, quoting *Faulkner*, 627 So. 2d at 366.

The Board does not challenge this analysis as a factual matter, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it had no ability to rein in those officials once they embarked upon an offensive, bias-tainted campaign to "get" a Nevada resident. And, while the Board claims that Nevada has no legitimate interest in deterring its misconduct – asserting that "exercising control over non-Nevada government actions is hardly a constitutionally valid objective" (FTB Br. 24) – that argument just reflects the Board's self-centered view of state sovereignty. What California does with respect to its own citizens

within its own territory is concededly not a matter of concern to Nevada, but the injuries in this case occurred precisely because California did *not* confine its unlawful acts to its own territory. Instead, it reached into Nevada in order to commit intentional torts against a Nevada citizen, actions that constituted a direct intrusion on Nevada's interests as an independent sovereign. [7]

Finally, we note the Alice-in-Wonderland quality of the Board's attempt to invoke Nevada's damages cap for Nevada officials. It may be recalled that, when the shoe was on the other foot in *Hall*, Nevada officials sought protection under the same Nevada law in the California courts, only to be told that California would not apply it. *See Hall*, 440 U.S. at 412-13 (discussing California proceedings). As a result, Nevada officials were exposed to unlimited damages in California for a claim of negligence. Here, of course, Nevada accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself liable for damages only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at harming a Nevada resident.

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[7] Although the Board complains that "the Nevada jury below was happy to side with a fellow Nevadan," FTB Br. 52, one hardly needs to be a Nevada citizen to be troubled by tax officials who announce an intent to "get that Jew bastard," become "obsessed" with that goal, create an entire "fiction" about the taxpayer, and try to use his legitimate concerns about privacy to force him into a settlement. *See* pages 3-4, *supra*. Of course, we cannot know how a California jury would feel about the same conduct – assuming that the Board would treat in-state taxpayers the same way – because the Board has absolute immunity in its home State.

Given these circumstances, the Board's demand for even greater immunity is particularly unjustified.

B. There Is No Federal Law Dictating What State Courts May Do as a Matter of Comity.

The Board also argues that the Nevada courts were required to apply California's law of immunity (above the amount of the Nevada damages cap) as a matter of comity. But the Board cites no case in which this Court has ordered a state court to grant comity to another State. That omission is hardly coincidental. As this Court has observed, "'[t]he comity . . . extended to other nations is no impeachment of sovereignty. It is the *voluntary act* of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.'" *Hilton*, 159 U.S. at 165-66, quoting *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (emphasis added). Given the voluntary nature of comity, it remains within the discretion of a forum sovereign to decide whether to grant comity to another sovereign and, if so, to what extent.

Disregarding this basic principle, the Board asks the Court to oversee state courts' application of comity to other States, in order to assure that the doctrine is being "'sensitively'" applied. FTB Br. 22, quoting *Hyatt I*, 538 U.S. at 499. This call for expanded *federal* supervision is an especially odd request from the Board, given that it purports to be trumpeting the cause of *state* sovereignty. Whatever the exact contours of state sovereignty may be, they are obviously diminished by transferring final decisionmaking authority from state courts to federal courts. In any event, however, the Board presents no legal basis for the notion that federal courts can tell

state courts how to make their comity decisions, presumably because no one has ever viewed the role of the federal courts as encompassing a power to mandate what States may do under the voluntary doctrine of state-to-state comity.[8]

That fundamental understanding was not altered by this Court's observation in *Hyatt I* that the Nevada Supreme Court had "sensitively" applied principles of comity to this case. 538 U.S. at 499. In *Hyatt I*, the Board had complained about the refusal of the Nevada Supreme Court to accord it full immunity, and this Court merely pointed out that the state court had gone out of its way to treat the Board as a true sovereign. That passing, and entirely correct, observation is hardly enough to launch a counter-intuitive "mandatory comity" doctrine that would override centuries of established law.

It is true, of course, that some provisions of the Constitution make mandatory what, prior to formation of the Union, was simply a matter of comity. For example, the Full Faith and Credit Clause unquestionably imposed enforceable obligations on the States, requiring them to honor the judgments of other States and, to a very limited extent, to apply other States' laws. *See Baker*, 522

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[8] The Board claims that respondent himself endorsed a link between comity and mandatory equal treatment. *See* FTB Br. 18. It is thus worth pointing out that, during oral argument in *Hyatt I*, counsel for respondent stated no fewer than *five* times that there are no enforceable principles of federal law requiring state courts to give equal treatment to other States. *See* JA180 ("I don't think there is a federally enforceable law of state comity"), 186 ("just a matter [of comity]"; "not federal [sic] enforceable"), 187 ("there's no federally enforceable state law of comity"; rejecting suggestion of "federal component" for state-to-state comity).

U.S. at 232 (noting that the "animating purpose of the full faith and credit command" was to make the States "integral parts of a single nation") (internal quotations omitted). As we have just discussed, however, the Full Faith and Credit Clause does not require Nevada to apply California's immunity laws here. *See* pages 42-50, *supra*. It would be highly anomalous, therefore, for this Court to impose a binding choice-of-law obligation under the doctrine of comity when a constitutional provision directly addressing that very question imposes no such duty.

The Privileges and Immunities Clause likewise places limits on the States' authority to act as independent sovereigns. But the plain language of that Clause rules out its application here. The Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1, and the States themselves are not "Citizens" of a State. As the sovereigns they are, the States must rely on voluntary principles of comity instead.

C. The Board's "Equal Sovereignty" Argument Rests Upon a Misunderstanding of Equal Sovereignty.

Finally, the Board tries to support its claim to equal treatment by invoking the concept of "equal sovereignty." But its argument totally misconstrues the import of that term. The fact that the States are equal sovereigns does not mean that a State has the same sovereign authority within the territory of another State as the latter State does. Rather, it means that each State has the same sovereign powers within *its* borders as other States have within *their* borders. The States' sovereignty is equal, but it is not overlapping.

The cases cited by the Board make that distinction very clear. In *Coyle v. Smith*, 221 U.S. 559 (1911), the Court relied upon principles of equal sovereignty to hold that Oklahoma had the right to determine the location of its state capital. But no one would think that Oklahoma has a voice, let alone an equal voice, in choosing the state capital of Kansas or Arkansas. Similarly, in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), the Court recognized that, under the equal-footing doctrine, Montana owned title to the riverbeds within its territory. Again, however, it would make little sense – indeed would turn the reasoning of *PPL Montana* on its head – to conclude that Montana has an equal right to riverbeds in other States.[9]

Even as a matter of pure policy, a strict equal-treatment-from-equal-sovereignty theory would have notable shortcomings. In particular, it would often lead to very *unequal* treatment between different States. Thus, if State A extends no immunity to its officials, while State B grants its officials complete immunity, the Board's "equal treatment" theory would mean that State B's officials would face unlimited liability in State A, even though State A's officials would have no liability whatsoever in State B. That lopsided result hardly fits the picture of perfect equality that the Board claims to be advancing.

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[9] The primacy of each State's sovereignty within its territory is reflected in various longstanding state practices. To take one example, most States exempt income from their own bonds from taxation, while levying taxes on income from bonds issued by other States. *See Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008); *Bonaparte v. Tax Court*, 104 U.S. 592 (1882).

In sum, nothing in federal law provides a basis for recasting the traditional law of state-to-state comity. The Nevada Supreme Court gave full consideration to the Board's status as the agency of a separate sovereign, and it applied principles of comity to grant the Board extensive protection. The Board may be unhappy that it did not get even more, but that grievance is not one of constitutional dimension.

CONCLUSION

The judgment of the Nevada Supreme Court should be affirmed.

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IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF PROFESSORS OF FEDERAL JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction who teach and write about the law governing litigation within our federal system, including state sovereign immunity. *Amici* hold varying views on the constitutional status and substantive scope of state sovereign immunity. We also take no position on the merits of the decision below. Instead, we come together in this case solely to address the second question presented—"whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled."

As we explain in the brief that follows, we are of the view that (1) *Hall* was (and remains) rightly decided; and (2) if, contra *Hall*, the Constitution were interpreted to confer absolute sovereign immunity upon states in their sister states' courts, such a result would either leave litigants like Respondent with no forum for their claims, or it would place significant—and, in our view, untoward—pressure on this Court's original jurisdiction.

---

1. The parties have filed blanket consents to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Both the Constitution itself and this Court's jurisprudence reflect a critical—and principled—distinction between two different species of state sovereign immunity: a state's immunity in its own courts and its immunity in the courts of another sovereign. "The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." *Hall*, 440 U.S. at 414; *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (quoting *The Federalist No. 81* (Alexander Hamilton)).

A sovereign's immunity in the courts of another sovereign, in contrast, does not inhere in *its* sovereignty, *see, e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822), and is therefore not a matter of absolute right, but rather one that is typically resolved by reference to the doctrine of comity, *see The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812). Like other common-law principles, comity can be overridden by positive law, just as the Eleventh Amendment overruled this Court's rejection of state sovereign immunity in federal courts in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). But neither Petitioner nor its many *amici* can identify a single source of positive law that expressly confers the

categorical sovereign immunity it seeks. *See Alden*, 527 U.S. at 738 (endorsing *Hall*'s holding that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another").

Not only was *Hall* therefore rightly decided, but, by depriving private parties of a forum in which to sue another state without its consent, the categorical sovereign immunity Petitioner seeks would cause mischief—either for the rights of litigants like Respondent or for this Court's institutional role. Even assuming that states may sue their sister states to vindicate the private rights of their citizens, *but see Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911), such suits may only proceed in this Court's original jurisdiction. *See* 28 U.S.C. § 1251(a). Although sovereign immunity would not apply in such a case, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838), this Court "is not suited to functioning as a *nisi prius* tribunal." *Maryland v. Louisiana*, 451 U.S. 725, 761 (1981) (Rehnquist, J., dissenting). "Such actions tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971)), and by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *Id.* (citation and internal quotation marks omitted). Thus, the rule Petitioner and its *amici* seek would not only put pressure on whether a state can (and would)

sue whenever one of its citizens is aggrieved by a sister state, but, if such suits do go forward, would thereby portend an uptick in this Court's original docket—one that would necessarily come at the expense of this Court's "primary responsibility" as a court of last resort on matters of federal law.

ARGUMENT

I. *NEVADA V. HALL* WAS RIGHTLY DECIDED.

This Court's state sovereign immunity jurisprudence has at its core two fundamental premises: "that the States entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), and that "[i]t is inherent in the nature of [that] sovereignty not to be amenable to the suit of an individual without its consent." *Hans*, 134 U.S. at 13 (quoting *The Federalist No. 81* (Alexander Hamilton)). Although Petitioner and its *amici* read this latter principle as extending to suits by virtually all comers in all forums, *Hall* correctly reiterated the nuanced—if at times elusive—distinction that this Court has always drawn between a state's sovereignty in its *own* courts and its sovereignty in the courts of another sovereign. To reach the conclusion that *Hall* was wrongly decided, this Court would not only have to collapse this distinction, but it would have to revisit the myriad precedents that depend upon it.

a. This Court's Jurisprudence Distinguishes Between a Sovereign's Immunity in Its Own Courts and Elsewhere.

As Justice Stevens explained in *Hall*, "The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Hall*, 440 U.S. at 414. The reason for this bifurcation has everything to do with the unique status of the states in the years between the signing of the Declaration of Independence and the ratification of the Constitution—as "sovereign states, possessing . . . all the rights and powers of independent nations over the territory *within their respective limits*." *Wharton v. Wise*, 153 U.S. 155, 166 (1894) (emphasis added); *see also McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796).

Thus, when the original states ratified the Constitution, they retained those aspects of the sovereignty they enjoyed as independent nations other than those which were surrendered to the federal government through the "plan of the convention." *See Alden*, 527 U.S. at 717. Whether or not, pace *Alden*, that sovereignty extended to immunity from suits under *federal* law, "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Hall*,

440 U.S. at 414; *see also Alden*, 527 U.S. at 715–17; *Hans*, 134 U.S. at 13.

b. At the Founding, Sovereign Immunity in the Courts of Another Sovereign Was a Matter of Comity.

The fact "that the States entered the federal system with their sovereignty intact," *Blatchford*, 501 U.S. at 779, hardly proves that they enjoyed immunity as an absolute right in courts of *other* sovereigns at the Founding; as Chief Justice Marshall noted in *The Schooner Exchange*, recognizing such immunity on the part of a foreign sovereign "would imply a diminution of [the home state's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." 11 U.S. (7 Cranch) at 136. In other words, where the interests of multiple sovereigns were implicated, the immunity inherent in a sovereign's home courts ran headlong into the foreign state's sovereign interest over *its* territory (and, as such, its tribunals).

This is not to say that sovereigns were therefore entitled to no special treatment in the courts of foreign sovereigns; quite the contrary. But "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* Thus, proper respect for sovereignty suggested that such consent could be presumed as a matter of comity. *See id.* at 136–37. Because it sounded only in comity, though, such

immunity could therefore be withdrawn (with appropriate notice) when the foreign sovereign's *own* interests justified such a measure. *See id.* at 146; *see also The Santissima Trinidad*, 20 U.S. (7 Wheat.) at 352–53.

As Respondent notes, "Far from seeking to discredit or explain away the principles of *Schooner Exchange*, [Petitioner] does not even refer to that decision." Resp. Br. at 22. But this Court *has* repeatedly reaffirmed the underlying soundness and continuing implications of these principles—not just in *Hall*, but throughout its foreign sovereign immunity jurisprudence. *See, e.g., Samantar v. Yousef*, 560 U.S. 305, 311 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848, 851 (2009); *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865–66 (2008); *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Unless *The Schooner Exchange* was wrongly decided—and all of these successive cases therefore wrong to rely upon it—then at the time of the Founding, a state's immunity in the courts of another sovereign was not an absolute right, but was rather a matter to be resolved through the doctrine of comity. *See generally Verlinden B.V.*, 461 U.S. at 486. ("As *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

c. No Constitutional Provision Overrides that Founding-Era Understanding.

Needless to say, principles of comity, deriving as they do from the common law, can be overridden by express statutory or constitutional command. So it was that this Court's decision in *Chisholm*, 2 U.S. (2 Dall.) 419, provoked the adoption of the Eleventh Amendment, and its clarification that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Although disagreement persists as to the scope of the Eleventh Amendment, what cannot be gainsaid is that provision's *distinct* relationship to the inherent sovereign immunity with which states entered the Union. As Justice Thomas has explained,

> Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision." As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but

> *one particular exemplification* of that immunity.

Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) (quoting *Alden*, 527 U.S. at 723) (emphasis added). Thus, the Eleventh Amendment provided the express constitutional command necessary to override the understanding that, rightly or wrongly, had driven the Justices comprising the majority in *Chisholm* to conclude that Article III authorized—and sovereign immunity did not preclude—the exercise of federal judicial power over a suit by a citizen of one state against another state. *See* 2 U.S. (2 Dall.) 419.

If Chief Justice Marshall's articulation of foreign sovereign immunity at the Founding, *see supra* Section I.B, is correct, then Petitioner must identify some comparable constitutional command that overrode those principles. Instead of doing so, however, Petitioner refers to this Court's jurisprudence recognizing that "the Constitution implicitly protects principles of sovereign immunity that go beyond the literal text." Pet'r Br. at 46. This statement is true so far as it goes. *See, e.g.*, *United States v. Lee*, 106 U.S. 196, 204–05 (1882) (recognizing the federal government's atextual sovereign immunity). But it certainly does not prove that the Constitution somehow overrode the comity-based approach to foreign sovereign immunity that governed one state's amenability to suit in the courts of its sister states prior to the Constitution's ratification.

Nor is there much to the argument that Article III *itself* overrode these principles insofar as it provided a neutral, federal forum for suits by states (or their citizens) against other states. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249. As Professor Woolhandler herself concedes, "During ratification and through the Court's *Chisholm* decision, debate arose over whether Article III and the state/citizen diversity provision (1) preserved state immunities, or (2) effected a waiver of sovereign immunity." *Id.* at 253. Whoever had the better of this argument (which remains at the heart of this Court's sovereign immunity jurisprudence today), no one suggested that, in fact, Article III recognized a *new* form of immunity insofar as it created a new forum for suits against unconsenting states. Because of *The Schooner Exchange*, however, this would *have* to have been the case in order for Petitioner to be correct—and for *Hall* to have been wrongly decided.

Aside from the paucity of contemporaneous historical evidence, this reading of Article III suffers from two separate—yet equally fatal—flaws: *First*, and logically, it would be more than a little odd to conclude that the Founders *expanded* state sovereign immunity by *authorizing* federal jurisdiction. *Second*, and pragmatically, this reading of Article III is belied by the ineluctable fact that the jurisdiction authorized by Article III did not have to be exclusive.[2] If Article III's

2. Congress has subsequently chosen to make this Court's original jurisdiction exclusive in suits between states, *see* 28 U.S.C. § 1251(a), but not in suits between states and other parties, *see id.* § 1251(b)(2), (3).

drafters meant, by authorizing *federal* judicial power in such cases, to displace pre-existing *state* authority over suits against other sovereigns, it stands to reason that they would have made their intentions far clearer.

Thus, *Hall* correctly concluded that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits" on a state's power to entertain a suit against another state. 440 U.S. at 420. Whatever the Constitution may have originally provided with respect to a state's amenability to suit in federal court and/or under federal law, as Justice Kennedy put it in *Alden*, "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." *Alden*, 527 U.S. at 738.

* * *

In any event, nothing in Article III *compels* the exclusivity of this Court's state-state jurisdiction. *See Mississippi* v. *Louisiana*, 506 U.S. 73, 78 n.1 (1992) ("Neither party disputes Congress' authority to make our original jurisdiction exclusive in some cases and concurrent in others. This distinction has existed since the Judiciary Act of 1789, and has never been questioned by this Court." (citation omitted)); *see also Ames* v. *Kansas ex rel. Johnston*, 111 U.S. 449 (1884) (upholding the constitutionality of concurrent original jurisdiction); Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 271 (7th ed. 2015) ("Since 1789, Congress has assumed that the Supreme Court's original jurisdiction could be made concurrent with the jurisdiction of the lower federal courts or of state courts.").

Of course, the fact that unconsenting states at the Founding did not inherently possess sovereign immunity in the courts of their sister states as a matter of absolute right does not (and did not) mean that they therefore lacked sovereign immunity in many—if not most—cases. It is unquestionably true that, at the Founding, states were *generally* not subject to suit in their sister states' courts. But as *Hall* correctly understood, this result sprung not from an absolute interstate sovereign immunity doctrine, but rather from the absence of sufficiently strong justifications in most cases for overriding the comity-based sovereign immunity that states then enjoyed. Thus, the question is not whether states generally enjoyed interstate sovereign immunity at the Founding; it is whether the Founders constitutionalized that immunity through Article III. As *Hall* concluded, though, that question answers itself.

II. OVERRULING *HALL* COULD PLACE UNDUE PRESSURE ON THIS COURT'S ORIGINAL DOCKET.

a. The Rule Petitioner Seeks Would Leave This Court's Original Jurisdiction as the Exclusive Judicial Forum for States Acting Unlawfully Outside Their Borders.

If, notwithstanding the above analysis, this Court were to hold that *Hall* was wrongly decided (and that principles of *stare decisis* do not support its retention), the result would be to leave individuals such as

Respondent without any forum in which to sue an unconsenting state that acts unlawfully outside its borders. In such a case, the only judicial remedy that even *might* be available for injuries such as those suffered by the Respondent here would be a suit by Respondent's *state* against Petitioner, since states do not enjoy any form of sovereign immunity in suits brought *by* their sister states. *See, e.g., South Dakota*, 192 U.S. at 318; *Rhode Island*, 37 U.S. (12 Pet.) at 720.

Even assuming a state would choose to expend the considerable resources necessary to bring such suits, this Court has, in the past, expressed skepticism that states have standing to sue their sister states as *parens patriae* solely to vindicate the rights of their citizens. *See, e.g., Oklahoma*, 220 U.S. at 289. Later decisions, however, have been somewhat more lenient in this regard. As Justice Douglas explained in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945),

> The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State.... The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative.

Id. at 450 (citations and footnote omitted); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (recognizing the existence of "quasi-sovereign" interests that allow states to proceed against other states or private parties as *parens patriae*).

To be sure, if states lack standing in cases such as this one, that is only further reason why the rule Petitioner and its *amici* seek would cause mischief—insofar as it would pretermit any remedy whatsoever, and thereby provide no legal deterrent for states to mistreat citizens of other states outside their borders (unless they then consent to suit for such abuses). But assuming *arguendo* that states *would* have standing to sue their sister states on facts similar to those presented here, such suits may only proceed in this Court's original jurisdiction. *See* 28 U.S.C. § 1251(a).

b. This Court Has Increasingly Disfavored Reliance Upon its Original Docket Except Where Absolutely Necessary.

That this Court would have the authority to exercise original jurisdiction over state-state suits arising out of facts like those presented here does not mean that this would be an especially wise alternative to the status quo. After all, "[t]he Court . . . is not suited to functioning as a *nisi prius* tribunal." *Maryland*, 451 U.S. at 761. Among other practical, logistical, and structural downsides, "[s]uch actions tax the limited resources of this Court by requiring [it]

'awkwardly to play the role of factfinder,'" *South Carolina*, 558 U.S. at 267 (quoting *Wyandotte Chemicals Corp.*, 401 U.S. at 498), and by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *Id.* (citation and internal quotation marks omitted).

All of these concerns help to explain Chief Justice Fuller's admonition that this Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute," *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), even in cases in which it is putatively exclusive, *see Texas v. New Mexico*, 462 U.S. 554, 570 (1983) ("[W]e have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction."); *see also, e.g., Louisiana v. Mississippi*, 488 U.S. 990 (1988) (mem.) (denying leave to file a bill of complaint over a three-Justice dissent).

Thus, the rule Petitioner and its *amici* seek would not only put pressure on a state to sue whenever one of its citizens is aggrieved by a sister state, but it could easily come to portend an uptick in this Court's original docket—one that would necessarily come at the expense of this Court's "primary responsibility" as a court of last resort on matters of federal law. As the younger Justice Harlan presciently warned over four decades ago:

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders.... It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.... [T]he evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497–98 (1971). Without question, state courts are a better forum for such disputes. And as *amici* have demonstrated, *Hall* correctly determined that the Constitution does not prevent them from serving such a role. Given the "anomalous" result that would

otherwise follow, *see id.*; *cf. Hans*, 134 U.S. at 10 (invoking a similarly "anomalous result" as justification for applying the Eleventh Amendment to suits by a citizen against his own state), *Hall* should be preserved.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that *Nevada v. Hall* should not be overruled.

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APPENDIX

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REPLY BRIEF

This suit, in which a private citizen has haled the sovereign taxing authority of California into Nevada state court against its will, has dragged on for seventeen years, imposing untold financial and dignity costs upon California. There is no end in sight—unless this Court reaffirms or reestablishes key principles of sovereign immunity.

Hyatt thoroughly abandons the equal-treatment principle he successfully advocated in *Hyatt I*. He now claims that Nevada is completely unfettered by federal law in deciding whether to give out-of-state sovereigns immunity in Nevada courts. Even as to core sovereign concerns as to which Nevada completely immunizes its sovereign actors, a sister State can be fully opened up to damages awards. Such a regime, with one State entirely at the mercy of another, seems purpose-built to produce the precise kind of friction among States that the Constitution was designed to eliminate. If that is truly what the law provides under *Nevada v. Hall*, 440 U.S. 410 (1979), then *Hall* cannot stand.

Hall should be overruled. The issue decided there is simply too fundamental to our constitutional design to tolerate an erroneous result that is irreconcilable with more recent, better-reasoned precedents. Hyatt concedes that, before the Framing, the States possessed sovereign immunity from suit in each others' courts. And he does not suggest that the ratification of the Constitution affirmatively destroyed that sovereign immunity. Instead, he posits a dichotomy between sovereign immunity "as a matter of comity" and sovereign immunity "as of right" and suggests that States possessed only the former in each

others' courts before the founding. But that is a false dichotomy. Outside a sovereign's own court system, what Hyatt terms sovereign immunity "as of right" could only exist *after* sovereigns joined together in a constitutional union. Such immunity "as of right" in each others' courts could not have pre-existed the founding, any more than State sovereign immunity "as of right" from suit in federal court could have pre-existed the Union. Thus, when this Court refers to States' retaining their pre-existing "sovereign immunity" and not being subject to suit in federal court unless the Constitution takes that sovereign immunity away, it is talking about what Hyatt tries to dismiss as sovereign immunity "as of comity."

Moreover, it is clear from Hyatt's conception of comity as entirely voluntary that, in his view, States now have no enforceable sovereign immunity in each others' courts whatsoever. None. Hyatt thus suggests that in joining together in a constitutional union designed to eliminate sources of friction among them, the States effectively sacrificed their sovereign immunity and created a dynamic where one State can allow its citizens to hale other States into its courts, thus guaranteeing friction.

Hyatt offers no explanation why a Nation sent into profound shock by the prospect of Georgia's being haled *into this Court* by a South Carolina citizen would have permitted Georgia to be haled into the decidedly less neutral *South Carolina* courts. If South Carolina had allowed such a suit and attempted to enforce a judgment against Georgia, the Union might not have survived its first decade. The far better view is that bedrock principles of sovereign immunity, preserved

by the plan of the Convention and enforceable by this Court, would bar such a suit.

Hyatt likewise offers almost no response to this Court's post-*Hall* sovereign immunity jurisprudence. Those more recent decisions undercut almost every pillar of *Hall*'s analysis. Even *Hall* acknowledged that a federal rule of law implicit in the Constitution would require a different result. The Court's post-*Hall* precedents recognize just such a rule.

Hyatt suggests that *Hall* does not interfere with the operation of State governments. But some 45 States—including Nevada itself—beg to differ. This case proves the point. While Hyatt lauds the decision below as a paragon of evenhandedness, it took FTB sixteen years (and untold taxpayer money) to obtain a decision that still leaves it (and California taxpayers) on the hook for $1 million with the prospect of retrial on a claim that previously netted Hyatt $85 million.

Finally, Hyatt suggests that States can attempt to recreate sovereign immunity through an elaborate multistate compact. But there already is a multistate compact that fully protects State sovereign immunity under these circumstances: the Constitution. That compact certainly allows the States to make mutual agreements to waive their sovereign immunity, but it does not obligate them to recreate what the plan of the Convention never took away.

ARGUMENT

I. A State May Not Refuse Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

Hyatt's view of the protection that federal law provides FTB underscores that his vision of sovereign immunity "as a matter of comity" is no sovereign immunity at all. Hyatt contends that neither comity, full faith and credit, nor equal sovereignty principles *require* Nevada to grant a sister sovereign involuntarily haled into Nevada courts the same immunities Nevada enjoys. Instead, Hyatt offers an effectively limitless rule: So long as a forum State is "'competent to legislate'" concerning a suit's subject matter, it is under no federal-law obligation to provide *any* immunity to a sister sovereign. Hyatt Br.43-44. And given the States' plenary power to legislate, Hyatt's proposed rule means that sovereign immunity "as a matter of comity" is sovereign immunity "in name only." Indeed, Hyatt emphasizes (at 50-52) that comity is entirely voluntary. Thus, under Hyatt's view, an out-of-state sovereign has no enforceable federal right to even a jot of immunity. That cannot be the law.

Despite having advocated an equal-treatment principle in *Hyatt I*, *see* J.A. 186, 195, 289, Hyatt now disparages it as a "jerry-built argument" seeking application of "*California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials." Hyatt Br.44. But FTB does not seek "to apply California's law of immunity," *id.* at 50; it seeks equal treatment through application of

Nevada's law of immunity, which includes a cap on compensatory damages.

Hyatt half-heartedly asserts that there is "no credible authority" to support FTB's proposed equal-treatment rule. *Id.* at 43-44, 46. But given the pre-*Hall* consensus that sovereign immunity precluded suits of this type altogether, it is a bit much to ask for deeply-entrenched precedent reflecting an equal-treatment limit on such suits. And, of course, this Court's sole relevant post-*Hall* decision, *Hyatt I*, embraced such a principle at Hyatt's urging. The equal-treatment rule is likewise supported by the Commerce Clause's non-discrimination principle and the Equal Footing Doctrine. FTB Br.19-20, 24.

Hyatt attempts to minimize *Hyatt I*'s distinction between permissible equal treatment and an impermissible "'policy of hostility'" toward a sister State. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003). Hyatt would limit a "policy of hostility" to States' "closing their courthouses to foreign causes of actions entirely." Hyatt Br.47 & n.6. But *Hyatt I* embraced a broader concept of "hostility" that Nevada had avoided by acting "sensitively" and "rel[ying] on the contours of [its] own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499. Moreover, *Hyatt I* and sovereign immunity more generally are principally concerned about the sovereign *as defendant*, not whether the courthouse door is open to foreign causes of action or the sovereign *as plaintiff*.

Hyatt's concerns about administrability are misplaced. FTB's rule would not engender "endless, time-consuming inquiries" or introduce a need to

weigh competing state interests. Hyatt Br.45-46. It is a simple test: just take the home forum's well-developed law of sovereign immunity for home-state entities and extend it equally to out-of-state sovereigns. This case illustrates the simplicity of the equal-treatment rule. Nevada law capped compensatory damages against Nevada's agencies at $50,000, yet the Nevada Supreme Court refused to apply that cap to a California agency. Under an equal-treatment rule, Nevada must extend the cap to California agencies. Nothing more is required.

Nor does this bright-line rule mean that the Court must become a federal overseer of State comity decisions. *Id.* at 50-51. Once this Court firmly establishes the equal-treatment rule, there is no reason to think that state courts will not apply it faithfully. And to the extent a State occasionally strays, this Court's review has far more to recommend it than Hyatt's alternative, which all but guarantees simmering hostility between States.

Hyatt contends (at 53) that an equal-treatment rule would give each State a "voice" in determining the laws of every other State. Hyatt is mistaken. Under an equal-treatment rule, each State makes its own determination about the scope of sovereign immunity available in its own courts. Equal treatment means only that *if* a State decides to give immunity to its own officials and agencies, then a sister State haled into its courts receives at least that *same* immunity. The home State is in the driver's seat.[1]

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[1] Since California law would plainly provide immunity from Hyatt's suit, this Court can leave for another day whether a defendant sovereign that has waived its sovereign immunity in

Hyatt's effort to defend the Nevada Supreme Court's failure to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis," *Hyatt I*, 538 U.S. at 499, only underscores that the rule he advocates provides out-of-state sovereigns no protection whatsoever. Hyatt emphasizes that the Nevada court's departure from Nevada's own benchmark immunity law was justified because California's officials are not "subject to legislative control, administrative oversight, and public accountability *in Nevada*." Hyatt Br.47-48 (emphasis added) (quotation marks omitted). But a sister sovereign's agencies will never be subject to substantial legislative control and oversight *in Nevada*, so the decision below is a recipe for never providing comparable immunity to a sister sovereign. That is hardly the "healthy regard" for sister sovereigns envisioned in *Hyatt I*.[2]

At bottom, if *Hall* is to remain the law, there must be some federally-enforceable protection for

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its own courts would nonetheless receive the benefit of a host sovereign's more generous sovereign immunity rule. Equal sovereignty principles suggest that the answer is yes, so that a plaintiff who wants the benefit of a more generous waiver must sue that sovereign in its home courts. But there is no need to answer that question.

[2] Hyatt attempts to justify the Nevada Supreme Court's refusal to accord FTB equal treatment by emphasizing FTB's allegedly "bias-tainted campaign" against him. Hyatt Br.48; *see also id.* at 3-4, 49 n.7. But Hyatt's key witness on these points was a former FTB employee who had charged FTB with wrongful termination, subsequently provided "consultant services" to Hyatt's team, and backtracked on her inflammatory testimony. J.A.265, 268-270, 283-288.

sovereigns involuntarily haled into the courts of their sister sovereigns. The regime Hyatt champions—in which a defendant State receives only the immunity the forum State offers it as a matter of grace, no matter how much immunity the forum State reserves for itself—is no protection at all. Both common sense and well-established principles of equal treatment and equal sovereignty demand that a sister sovereign be treated at least as well as the home sovereign. Fealty to even more fundamental constitutional principles demands the overruling of *Hall*.

II. *Nevada v. Hall* Was Wrongly Decided And Should Be Overruled.

A. Hyatt Concedes that States Possessed Sovereign Immunity in the Courts of Other States at the Framing, and His False Dichotomy Between Types of Sovereign Immunity Is Unavailing.

1. Hyatt does not dispute that, at the Framing, the States possessed sovereign immunity from suit in the courts of other States. *See, e.g.*, Hyatt Br.26 (conceding the "fact of sovereign-to-sovereign immunity" at the Framing). Nor could he, for every shred of historical evidence confirms that proposition. The leading case so held. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 78, 80 (1781) (dismissing case against Virginia in Pennsylvania courts because "all sovereigns are ... exempt from each other's jurisdiction"). The Framers recognized the principle. *See* FTB Br.32-33. And the swift passage of the Eleventh Amendment confirmed it. A populace shocked by the prospect of Georgia's being haled into this Court by a South Carolina citizen did not think

the South Carolina courts could entertain the action. *See id.* at 35-37. Hyatt does not question this straightforward proposition and, except for one passing reference, does not mention the Eleventh Amendment *at all*.

Given that the States plainly possessed sovereign immunity in other States' courts at the founding, Hyatt must show that States were dispossessed of this immunity "by the plan of the Convention or certain constitutional amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). But Hyatt does not even attempt to make this showing. And all the available evidence—again, unrebutted by Hyatt—points firmly in the opposite direction. As Edmund Randolph explained, the Constitution "'confirms'" the pre-existing prohibition on States' entertaining suits against other States. FTB Br.33. Article III provided a neutral federal forum for suits between States and between an individual and another State because, as Randolph explained, to the extent "'a particular state can be a party defendant, a sister state cannot be her judge.'" *Id.* When the Eleventh Amendment withdrew that federal forum for individual suits against States, it reinforced that such disputes could not proceed in any forum—not in a neutral federal forum and, *a fortiori*, not in the less-neutral courts of the citizen's home State. *Id.* at 46-47; *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) ("The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states[.]").

2. Forced to concede both the fact of interstate sovereign immunity at the Framing and that the plan

of the Convention only confirmed that immunity, Hyatt essentially concedes his case. Undeterred, he attempts to deprive those concessions of their fatal sting by positing that there are two variants of sovereign immunity—immunity "as a matter of comity" and immunity "as of right"—and that, in each others' courts, States only ever enjoyed, and the Constitution only preserved, the former. This convoluted theory is profoundly misguided.

To begin with, Hyatt's proposed dichotomy between immunity "as a matter of comity" and immunity "as of right" is spurious. At best, it confuses questions of how sovereign immunity is enforced with whether and "what type" of sovereign immunity exists. To be clear: sovereign immunity from suit is an inherent attribute of sovereignty; all sovereigns possess it. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014); *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011). And before the plan of the Convention was ratified, the States clearly possessed this sovereign immunity from suit, including immunity from suit in the courts of their sister sovereigns, and not just some junior-varsity variant of sovereign immunity.

If, before ratification, South Carolina had allowed one of its citizens to hale Georgia into South Carolina court over Georgia's objection, there is no question that action would have violated Georgia's sovereign immunity. No one would have said that South Carolina did not violate Georgia's sovereign immunity because Georgia enjoyed only "sovereign immunity as of comity" and South Carolina declined to extend comity. Putting to one side what Georgia would do in

response to that obvious affront to its sovereignty and dignity, there is no question that South Carolina's action would have been understood to violate Georgia's sovereign immunity. Every member of the Framing generation would have recognized as much.

Thus, speaking of whether States possessed "sovereign immunity as of right" or "sovereign immunity as a matter of comity" at the Framing is inapt. The States possessed sovereign immunity—full stop. But the problem with Hyatt's suggested dichotomy runs deeper still. Hyatt appears to demand that FTB demonstrate that States enjoyed "sovereign immunity as of right" *before* the Framing. But, as to any courts but a sovereign's own, the very notion of "sovereign immunity as of right" presupposes a binding legal relationship among sovereigns that only the Constitution could provide. Independent nations must rely on comity, whereas States within the Constitution can demand that certain aspects of their sovereignty be protected as a matter of right. By demanding that States demonstrate pre-ratification "sovereign immunity as of right" in each others' courts, Hyatt quite literally demands the impossible. He might as well demand a unicorn. If his conception of what a State must demonstrate to have an enforceable federal right to sovereign immunity were correct, then no State would enjoy any enforceable right to sovereign immunity in any courts but its own, yet a host of this Court's cases are to the contrary.

Indeed, the impossibility of pointing to immunity "as of right" that pre-existed the Constitution is even more obvious with respect to the States' immunity in the federal courts. Because the Constitution created

those federal courts, demanding proof of a pre-existing immunity from suit in those courts would demand the impossible. And since federal courts are courts of a distinct, superior sovereign, any analogous pre-constitutional sovereign immunity States possessed would necessarily be what Hyatt terms sovereign immunity "as a matter of comity." Thus, when this Court's cases ask whether a State enjoyed sovereign immunity from comparable suits at or before the Framing, they do not demand sovereign immunity "as of right." Sovereign immunity "as a matter of comity"—or, more to the point, sovereign immunity *simpliciter*—suffices to shift the burden to the plaintiff to show that the sovereign immunity was eliminated by the plan of the Convention (a burden Hyatt does not even try to carry).

Hyatt's demand for pre-existing sovereign immunity "as of right" also would mean that States have no enforceable federal protection against being sued by their sister States in state court. If, before the Framing, Massachusetts purported to sue New York in Massachusetts court, every Framer would have recognized it as a violation of New York's sovereign immunity. But that sovereign immunity would not have been "as of right." New York would have needed to depend on Massachusetts to recognize New York's undoubted sovereign immunity.[3] Thus, under Hyatt's logic, if Massachusetts files such a suit today, New

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[3] Put differently, Massachusetts had the raw power to disregard New York's sovereign immunity, but not the right to do so. And the raw power to deny immunity and provoke a diplomatic crisis with a sister State is not a power that is compatible with the plan of the Convention.

York just has to hope Massachusetts voluntarily extends sovereign immunity. That is nonsense. It is plain that New York has an enforceable federal right to insist that Massachusetts respect its sovereign immunity and bring an original action in this Court or no action at all. The same would have been true before the Eleventh Amendment if Chisholm had sued Georgia in South Carolina state court. At a minimum, Georgia could have insisted that the suit be brought in this Court or not at all. And when the Eleventh Amendment eliminated the possibility of bringing the suit here, it did not somehow eliminate Georgia's undoubted immunity from being haled into South Carolina court by Chisholm.

3. At bottom, Hyatt conflates the means of enforcing sovereign immunity and the existence of sovereign immunity in the first place. While the latter is what matters, Hyatt's vision of how States' "sovereign immunity as of comity" would actually be enforced only underscores his argument's flaws. Before the States joined together in the Union, they could redress a violation of their sovereign immunity through the tools available to independent sovereigns. Thus, South Carolina's hypothetical affront to Georgia's sovereignty and dignity would have precipitated diplomatic negotiations, enforcement of treaties, or outright war. *See, e.g.*, James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 583 & n.105 (1994). The States largely agreed to cede those diplomatic and military options as part of the plan of the Convention. *See* U.S. Const. art. 1, §10 (prohibiting States from entering into treaties, imposing import duties, or engaging in war). Thus,

Hyatt's position leads to the untenable conclusion that the States have no meaningful ability to prevent a sister sovereign from blatantly disregarding their core sovereign immunity and cannot stop that sister sovereign from entering a judgment against them at the behest of a private citizen.

Hyatt conveniently omits any discussion of how a judgment entered in obvious derogation of a State's sovereign immunity would be enforced. Pre-ratification, one option for Georgia in responding to the hypothetical South Carolina state-court judgment would be to dare South Carolina to try to enforce it. But even post-ratification, there is no obvious mechanism for enforcement. It is inconceivable that the Framers, dedicated to eliminating the unenforceable judgments and simmering disputes that bedeviled the Articles of Confederation, *see generally* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817 (2010), would have sanctioned a variant of sovereign immunity that all but guaranteed unenforceable judgments and long-simmering disputes. A vision of the "Union" in which one State seizes the neighboring State university's team bus during a football game to satisfy an unpaid judgment is not a happy one, and it was not the Framers' vision. The Framers envisioned that the States' pre-existing sovereign immunity from suit in each others' courts would be enforced the same way as all other aspects of State sovereign immunity that survived the plan of the Convention: as a federal right enforceable in this Court. *See, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002); *Alden*, 527 U.S. at 712.

4. Hyatt relies heavily—indeed, almost exclusively—on *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), and subsequent law-of-nations decisions by this Court. But those cases do not help him. *Schooner Exchange* and later decisions hold that, under law-of-nations doctrine, there are circumstances in which one independent sovereign can exercise jurisdiction over another independent sovereign. The problem for Hyatt, however, is that none of those circumstances is present here, and even Hyatt's own cases acknowledge the existence of core intrusions upon sovereign immunity that constitute violations of the law of nations justifying diplomatic or military response. *See, e.g., id.* at 143. And at the Framing, one State's exercise of jurisdiction at the behest of one of its citizens over another State indisputably *was* considered one of those core affronts to sovereignty. *See Nathan*, 1 U.S. (1 Dall.) at 77 (agreeing that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void."); FTB Br.32-33.[4]

What is more, the law-of-nations principles that govern relationships among fully independent sovereigns have little relevance to how the States' sovereign immunity is to be protected post-ratification. All concede that States had sovereign

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[4] Hyatt notes (at 22) that the Pennsylvania Attorney General supported Virginia's claim of immunity in *Nathan*, which no doubt reflects the reality that with independent nations, the executive branch bears the brunt of the diplomatic affront caused by the courts' disregard of another sovereign's immunity. Post-ratification, state executive officials no longer have diplomatic duties, but it is telling that Nevada's Attorney General supports FTB's claim of immunity.

immunity from suits like this pre-ratification, and no one thinks that enforcement of that sovereign immunity post-ratification is guided by law-of-nations principles, such that California can withdraw diplomats or declare war. As Justice Iredell recognized in his dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), later vindicated by the Eleventh Amendment: "No part of the Law of Nations can apply to this case ... since unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples." *Id.* at 449.

Schooner Exchange, which addressed relations between the United States and France, obviously had no need to address any of these considerations unique to the States at the Framing. And it certainly did not address whether the Constitution permits one State to involuntarily hale another State into its courts. That is why, for nearly two hundred years after the Framing—and notwithstanding *Schooner Exchange*—state courts and this Court universally believed that the Constitution prohibited this practice. *See* FTB Br.37-39. And that is why, in the 167 years between *Schooner Exchange* and *Hall*, *not one decision* in state or federal court cited *Schooner Exchange* as even relevant to the issue. Only in *Hall* did this Court abruptly change course by—like Hyatt—erroneously relying on *Schooner Exchange*.[5]

Finally, even *Hall* conceded that "when *The Schooner Exchange* was decided, or earlier when the

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[5] No party nor any of the lower-court decisions in *Hall* cited *Schooner Exchange*. *See* FTB Br.42, 48 & nn.13 & 15.

Constitution was being framed," one State could not be involuntarily haled into the courts of another State. 440 U.S. at 417. *Hall* admitted that if there were "a federal rule of law implicit in the Constitution" requiring adherence to that Framing-era "sovereign-immunity doctrine," the States would be bound by it and could not exercise jurisdiction over each other in their courts. *Id.* at 418. Thus even if Hyatt were correct about the relevance of *Schooner Exchange* to the question, that only gets him so far as *Hall*'s search for a "federal rule of law implicit in the Constitution." And while *Hall* failed to identify such a rule, both the analysis detailed above and this Court's more recent, better-reasoned sovereign immunity precedents make clear that there is an enforceable federal rule that guarantees the States the sovereign immunity they enjoyed at the Framing.

B. *Hall* Cannot Be Reconciled With This Court's More Recent, Better-Reasoned Precedents.

The Court's post-*Hall* jurisprudence confirms that *Hall*—incorrect the day it was decided—cannot survive. These precedents have rejected almost every rationale on which *Hall* was based. Since *Hall* was decided, State sovereign immunity is now recognized as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). The Court has repeatedly acknowledged the "structural understanding" that "States entered the Union with their sovereign immunity intact" and "retained their traditional

immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments.'" *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (quoting *Alden*, 527 U.S. at 713). As such, in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-27. The reasoning of these decisions not only thoroughly undermines the foundation of *Hall*, but also supplies the "federal rule of law implicit in the Constitution" that *Hall* believed missing.

Hyatt barely acknowledges these precedents. When he does, he contends only that they "address[ed] quite different questions about the States' immunity in federal tribunals and their own courts." Hyatt Br.35. But suits in federal courts and suits in another State's courts are similar in the relevant respects. In both cases, States enjoyed immunity from comparable suits before ratification. In both cases, States cannot rely on their power over their own state courts to ensure that their sovereign immunity is protected. And in both cases, States are not reduced to the only means of enforcement available in other courts pre-ratification (*i.e.*, via comity and diplomacy), but have an enforceable immunity of constitutional dimension (*i.e.*, via the "federal rule" deemed both critical and absent in *Hall*).

Hyatt maintains that none of the Court's more recent decisions "discussed, let alone disavowed, the principles of *Schooner Exchange*." *Id.* at 12. Just so.

But that only underscores that *Schooner Exchange* is irrelevant to the question at hand. Indeed, even *Hall* recognized that it need not "disavow[]" *Schooner Exchange* (which governed relationships between independent sovereigns) if it identified a "federal rule of law implicit in the Constitution" to govern the sovereign immunity of the States of the new Union. That rule—that States enjoy their pre-existing sovereign immunity as an enforceable federal constitutional right that cannot be displaced even by a federal statute, unless the immunity is inconsistent with a specific constitutional provision or the plan of the Convention—is what these more recent cases provide, in spades.

The Court's more recent decisions also answer Hyatt's complaint (at 34) that FTB's evidence and arguments mirror those in Justice Rehnquist's *Hall* dissent. The same could be said for virtually every one of this Court's post-*Hall* sovereign immunity decisions.

Hyatt effectively concedes that his position would result in multiple doctrinal anomalies. First, it would undercut *Alden*, which held that States are shielded from federal-law suits in their own courts by sovereign immunity of a constitutional dimension that Congress cannot abrogate via Article I powers. Under Hyatt's theory, the plaintiffs' mistake in *Alden* was suing Maine in Maine state court. If only they had sued Maine in New Hampshire state court, Maine would have no federally enforceable immunity to invoke. Second, even if Maine were somehow immune from such a federal-law suit in New Hampshire court, it would nonetheless be subject to suit under New

Hampshire law in New Hampshire court. Thus, a State cannot be bound by supreme federal law, but can be bound by a sister State's law. That is a "tremendous anomaly," as Justice Breyer rightly observed during the *Hyatt I* oral argument. *See* J.A.182. Third, as Justice Kennedy noted in that same argument, it is "very odd," to say the least, to conclude that a State "can't be sued in its own courts and it can't be sued in a federal court, but it can be sued" in a sister State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181; *see also* FTB Br.49-50 (noting scholars' similar views). Fourth, as Hyatt does not dispute, preserving *Hall* would mean that Indian tribes enjoy broader immunity than States, despite the "qualified nature of Indian sovereignty." *Bay Mills*, 134 S. Ct. at 2030-31; FTB Br.48.

C. Hyatt's Remaining Arguments Do Not Save *Hall*.

Hyatt claims, remarkably, that despite exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "is of little importance to effective operation of state governments." Hyatt Br.36. At least 45 States beg to differ. *See* States' Br.21-31; S.C. Br.2-4, 17-20; *see also* Br. of Council of State Governments *et al.*16-20. While this suit is an especially egregious example, suits against non-consenting sovereign States in sister States' courts are nowhere near as "rare" as Hyatt imagines. *See, e.g.*, States' Br.23-26. All of these suits threaten the dignity and respect of the sovereign State and seek either money from the State treasury or changes to State policy, dictated by out-of-state juries

and judges.[6] Indeed, multiple suits have recently been filed against FTB in other States. *See* FTB Br.52. State taxing authorities like FTB are a particularly easy target for lawsuits, given their inherent unpopularity. It is not difficult for a disgruntled taxpayer to obtain local jurisdiction over an out-of-state taxing authority. Multistate Tax Comm'n Br.6-8. Yet, as Hyatt's own case demonstrates, such suits have an especially pernicious impact on the fundamentally sovereign function of tax collection, and they disrupt the multistate cooperation that is essential to enforcement of state taxes. *Id.* at 8-21.

Hyatt also insists that the "doctrine of comity" provides sufficient protection to States, pointing to the fact that the Nevada Supreme Court did grant *some* protections to FTB. Hyatt Br.35; *see also id.* at 15, 37, 47-48. But this only underscores the utter arbitrariness and unpredictability the States must endure under *Hall*. Make no mistake, Hyatt's position is that the modicum of sovereign immunity afforded by Nevada was entirely a matter of grace. It was neither an entitlement dictated by the scope of Nevada's waiver of sovereign immunity for its own state agencies, nor predictable based on the contours of that waiver or anything else. And FTB needed to spend sixteen years in litigation—expending untold

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[6] Even suits that do not proceed to final judgment have these undesirable consequences. For example, Nevada recently settled a suit against it in the California courts by agreeing to pay $400,000 and to alter state policy. *See* FTB Br.55; Janie Har, *San Francisco OKs Patient-Dumping Lawsuit Settlement*, Associated Press, Oct. 27, 2015, http://perma.cc/7uy4-xc8y.

amounts of time, effort, and taxpayer money—just to secure that small measure of protection.

Hyatt further contends that there is no need to overturn *Hall* because States could "enter into bilateral or multilateral agreements to provide immunity in each others' courts" or petition Congress to resolve the problem. *Id.* at 37-41. But the States already entered into a multilateral agreement to provide federally-enforceable rights to immunity—namely, the United States Constitution. There is no need for them to meet again to protect sovereign immunity that pre-existed the Constitution and was not altered by that document, but only confirmed by both the unamended Constitution and the Eleventh Amendment.

While Hyatt is correct that there is room under our Constitution for States to negotiate over the circumstances in which they are subject to suit in each others' courts, he gets the default rule exactly backwards. There is a long tradition of sovereigns agreeing to waive their sovereign immunity in their own courts or in each others' courts as a matter of mutual consent. There is no comparable tradition of assuming that the States have waived their pre-existing sovereign immunity by entering the Union and forcing them to recapture that immunity through a new multistate compact.

Hyatt mistakenly suggests that overruling *Hall* would leave individuals "without any redress" against States. Hyatt Br.40; Professors' Br.13-14. But the Court has heard similar complaints before and has found the possibility insufficient to trump sovereign immunity preserved and guaranteed by the

Constitution. If the need for a remedy could not overcome the constitutional basis for immunity when it comes to suits in the defendant State's own courts or the neutral federal courts, it should not suffice to create remedies in *another* State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181.

Moreover, as a practical matter, Hyatt possesses, and is pursuing, avenues for judicial recourse in the California courts. While FTB has understandably not opened itself up to tort suits like this, Hyatt is challenging FTB's audits and assessments in administrative proceedings and will have the opportunity to challenge them in California courts. *See* FTB Br.5 & n.3. California law also provides a cause of action in the California courts against FTB for the alleged breaches of confidentiality and privacy underlying his suit. *See, e.g.*, Cal. Civ. Code §1798.45. It further provides a cause of action against "any officer or employee" of FTB who "recklessly disregards board published procedures." Cal. Rev. & Tax Code §21021(a). Those partial waivers of sovereign immunity are a product of legislative judgment, not judicial whim, and they make clear that Hyatt is not without a remedy in California court.

Hyatt does quite emphatically lack a remedy in Nevada court. Like Chisholm before him, Hyatt cannot hale an unconsenting sovereign into court against its will. Indeed, not even Chisholm thought the appropriate reaction to the Eleventh Amendment was to sue Georgia in South Carolina court. That *Hall* would have permitted Chisholm's state-law suit is a testament that it was incorrect the day it was decided.

Stare decisis is not an inexorable command, and the relevant considerations cannot save *Hall*. There are no meaningful reliance interests on *Hall*, and subsequent decisions have undermined its foundations and have proved the decision anomalous, unworkable, and plainly erroneous. If ever there were a "special justification" for overturning a precedent, it is present here. The issue at hand is too important to our basic constitutional structure to leave *Hall*'s manifest error uncorrected.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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